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No. 87

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

DAVID WEAVER ADAMS, et al.,  
*Petitioners*

PAN AMERICAN WORLD AIRWAYS, INC., et al.  
*Respondents*

**JOHN ERIC CLIFTON, et al.,**  
Petitioners  
v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.  
Respondents

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## **QUESTIONS PRESENTED**

1. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), did the Court intend to overrule its earlier cases and direct the lower federal courts to apply new restrictions on the availability of the treble damage remedy in § 4 of the Clayton Act?
2. Is the defendants' intent to harm the plaintiffs a factor supporting standing to sue under § 4 of the Clayton Act or does it bear only on establishing an antitrust violation?
3. In *Associated General Contractors*, did the Court intend to overrule *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931), and exclude as proper plaintiffs under § 4 of the Clayton Act victims whose damage claims involve complex but not speculative issues of proof?
4. In determining proper plaintiffs under § 4 of the Clayton Act, does the rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), apply to claims with conflicting premises even if there is no risk of duplicative recoveries or apportionment of the same damages?
5. In *Associated General Contractors*, did the Court intend to deny access to the treble-damage remedy of § 4 to plaintiffs whose claims may theoretically tend to complicate a suit when there is, in fact, no realistic possibility of joinder of their claims with other plaintiffs seeking different damages?

## THE PARTIES

Petitioners-plaintiffs<sup>1</sup> are those former employees of Laker Airways Limited who allegedly have been unable

<sup>1</sup> David Weaver Adams; Edgar Hubert Adams; Sandra Alice Adcock; Mohamed Salim Akram; Jack G. Allum; Richard Andrews Anderson; Stephen John Anderson; Malcolm Bruce Anderton; Geoffrey Sigurd Andreasen; Geoffrey William Ansell; Michael Frederic Ashby; Richard Leslie Axby; Geoffrey Baggaley; Alan Frank Bampton, Anthony Owen Barber; Anne Louise Todd Barrett; Richard Hugh Barton; Alfred George Batchelor; Michael George Bealch; Donald Lawrence Beattie; Gerard Rene Yvon Bergot; Nicholas Adrian Collier Bevan; Colin Bicknell; Allan Gordon George Blake; Aubrey Denis Blake; Colin Blake; George William Blewett; Anna Blonstein; Simon Kenneth Carnon Boston; Harry Bowden-Smith; Christopher James Boyle; Beverley Janine Blum Boyle; Stephen Brand; Michale Stuart Bree; Geoffrey John Brookes; Raymond Peter Brown; Donald Bryant; Keith Bullock; Kurt Bunce; William Henry Laurence Bunce; Timothy Joseph Burnett; Edward Thomas Burns; Pamela Jane Burtles; John Francis Byrnes; Cuthbert Calixte; David Edward Carter; Eric John Carter; Shelley Thea Streatfield Carter; Geoffrey Bryan Cartner; Keith Anthony Castle; Michale John George Cater; Ian Chalmers; Harold Charles Chapmen; Grenville Norman Church; John Henry Kerswell Clark; Gerald Alfred Clifton; John Eric Clifton; Robert Gordon Cockerill; Albert Ernest Coleman; Robert Douglas Coles; Alfred Collens; Patrick John Connington; Peter Cort; James O. Court; David William Coxhill; Carolyn Barbara Craddock; P. Cremin; Trevor Cresswell; William John Cronin; Robert Peter Gordon Crooke; Robin Ian Kenneth Cross; Anthony Joseph Cruz; Terence Alan Curry; Jack Cuthew; Roderick Trevor Daniels; Michael John Davies; Timothy Alfred Davies; Ian Charles Deloford; George William Devall; Jonathan Christian Devaux; Gregory B. Dix; Jean Docherty; Myriam Jeanne Georgette Dorman; Ronald Drakeford; Theresa M. Dugandzic; Linda A. Earls, Kenneth William Edwards; Martin Emery; Donald James Evans; Lawrence Evans; K.V. Fairbrother; Michael George Farmer; Francis James Fawcus; Terence Arthur Fensome; Edward Jock Ferrier; John Beverley Finbow; Duncan Stanley Fisher; Michael John Flake; William James Forrest; Judy Patricia Fortune; Murray Kirkham Fullarton; John Leonard William Fuller; Roger L. Fulljames; Robert James Fulton; Cormak Keven Gantly; Richard Hugh Gardner; Brian Terence Gerry; William George Gevaux; Colin Francis Glover; Claire Elizabeth Godden; David John Godwin; Roger Goff;

to secure employment comparable to their Laker jobs since Laker was allegedly forced to cease operations by the allegedly anticompetitive conduct of the respondents-

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John Francis Goodall; Reginald Charles Tig Gow; Clive Frederick Greatorex; John Alan Greenhead; Gordon Stewart Grierson; Nina Pamela Griffin; Stephen Thomas Gurton; Carolyn Irene Guy; David John Christopher Hall; Derek Charles Edward Harper; Ralph Frank Harper; Malcolm Charles Stuart Harris; Alan George Harrison; Jason Archibald Harrison; Maurice Anthony Hart; James William Hartley; Fred Haslam; Brian Allan Hay; Raymond George Hayward; Raymond John Hazzard; Stephen Charles Heffer; Alan Collis Hellary; Michael Houghton Hewitt; Peter Grant Hill; Peter Jeremy Hobbs; Peter Leonard Hook; Ronald Samuel John Hook; Eric Wynne Hopkins; Ivor Stephen Howard; Vaughan Richard Bonnell Howell; Michael Keith Hubbard; Bernadette Anne Hughes; Graham Frederick Humberstone; Garnet Richard Hunt; Peter John Hutley; Timothy John Hutton; Keith James, Stephen James; John C. Jarvis; Alan Charles Jenkins; Martin Stewart Jones; Russell Clement Jones; Betty Kelly Judge; Colin Kaletsky; Claude Keebe; Thomas F. Keely; Ian Philip Kelly; Anthony Brian Kennedy; J.W. Kindleysides; Peter Ilda Klesnil; John Alan Knight; Nick Koutsis; Graham Philip Lamb; Anthony Stuart Lighton; Michael John Limpkin; Ralph Brian Kneen Lines; Philip Patrick William Lowe, Patrick John MacLaughlin; Marcus MacLean; Paul Allan Mansbridge; Christine Irene Manson; James McGregor Conlogue Manson; Robert John Marsh; Geoffrey Caselton Martin; Godfrey Donovan Mason; Edward Paul Maspero; Peter Alan May; Philip Alan McCartney; John McClellan; Allan Charles McCormack; Katherine McDonald; Nuala Ann McGowan; Melvyn Henry McKenzie; Ian McLean; Nigel Justin McLean; William Wood McNab; John Richard Mealor; Henry John Meaney; Terence John Michaels; Leonard Francis George Middleton; Ian Gordon Milne; Anthony James Murphy; Brian George Murphy; George Bancroft Newby; Sandra Anne Newby; Brian Newman; Adrian Keith Nicholl-Morris; Andrew Malcolm Noller; Malcolm Edward Norris; Donald Nelson Osborn; Robert Winston Osborne; John Richard Page; Cyril Hugh Palmer; Terence Hugh Peacock; Peter Pearman; Ann Elizabeth Pelham; Anthony James Pelham; Richard Francis Pickles; Robert Edward Pitts; Anthony James Poirrier; Joy Ann Poirrier; Jeffrey Brian Price; Peter Christopher Price; Truda Jill Proctor; Christopher Sigfried Radford; Desmond Harold Randall; David Frederick Randell; Barry Norman Rawlins; David Clarence Read; Lorna Renner; Frederick William Richardson; John Leonard Richardson; Albert Edward Riches; Michael William Robertson;

defendants. Respondents-defendants<sup>2</sup> are the persons who allegedly conspired to dismantle Laker's work force.

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B.M.O. Robinson; Frank William Robinson; Robert William Robinson; Peter Alban Rockhill; Hugh Stewart Ross; Henry Charles Runacres; Brian Edward Harry Russell; Theresa E. Ryan; Derek Frank Salmon; Alex Sanchez; Brian Victor Sandford; Frank Roy Scholtka; Douglas Brian Scott; Michael Ormond Searle; Robert John Selmes; Peter Michael Shaw; Douglas Frederick Sibley; John Simpson; Andrew David Sims; Kenneth James Sinclair; Timothy Hepburn Sindall; Rosemary Skegg; Geoffrey Skelton; John Derek Skelton; Douglas A. Smith; Kingsley Smith; Rodney Smith; George E. Spencer; John Jerrard Spouse; Gregory Miles Stapleton; Richard Patrick William Steele; Michael Timothy Stent; Andrew Toby Satchwell Stevenson; John Gerard Stewart; Jane Helen Stone; Anne Elizabeth Stroud; Martin Robert Brandon Sumner; Graham Richard Swift; John Frederick Tayler; David Marshall Taylor; Kenneth John Taylor; Glen Douglas Tennant; Michael Arthur Tester; Donald Thomas; Leslie Thomas; Peter Anthony Thompson; Walter Thompson; Christopher Tilney; Leslie Cambridge Toghill; Ronald Victor Townsend; Alistair John Travers-Wakeford; Norman Donovan Turnbull; Kim Susan Tyrrell; Cees Van Dooren; Susan Lynn Van Dooren; Elizabeth Variello; Michael John Veal; Alan Walter Ward; John Henry Ward; Robin Leonard Sidney Warren; Sheila K. Webb; Victor George Wells; Peter Anthony Wheeler; Brian Wheelhouse; Colin Guy White; Michael John Frederick White; Reginald N. White; Robert Ian White; Peter John Whittle; David Reginald Wiggins; Brenda Margaret Williams; Christopher John Hemmings Williams; David Anthony Williams; Helga Darien Williams; Thomas Frederick John Williams; David James Willis; Anthony Clifford Willson-Pepper; John Wilson; Jane Anne Wilton; Arthur Roy Winn; David William Woods; John Desmond Paton Worsley; Frank David Wright; Violet Elizabeth Marion Wyatt; P.B. Yeo; Barbara Zientek.

<sup>2</sup> Pan American World Airways, Inc.; Trans World Airlines, Inc.; British Airways Plc; Lufthansa German Airlines; Swissair, Swiss Air Transport Company Limited; British Caledonian Airways Limited; McDonnell Douglas Corporation; McDonnell Douglas Finance Corporation; Sabena, Belgian World Airlines; KLM, Royal Dutch Airlines, Union De Transports Aeriens; Scandinavian Airlines System; Linee Aeree Italiane, S.p.A.; Lineas Aereas De Espana, S.A.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in Case Nos. 86-5468 and 86-5469, entitled *Adams v. Pan American World Airways, Inc.*, and *Clifton v. Pan American World Airways, Inc.*

**OPINIONS BELOW**

The opinion of the Court of Appeals affirming dismissal of the plaintiffs' claims is reported at 828 F.2d (D.C. Cir. 1987) and is reproduced in Appendix A, pp. 1a-17a. The memorandum of the District Court for the District

of Columbia dismissing the complaints is reported at 640 F. Supp. 683 and is reproduced in Appendix B, pp. 18a-23a.

### **JURISDICTION**

The decision of the Court of Appeals was entered on September 1, 1987, and petitioners' timely petition for rehearing was denied on October 23, 1987. (28a) This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

### **STATUTES INVOLVED**

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

### **STATEMENT OF THE CASE**

Petitioners are former employees of Laker Airways Limited ("Laker") who filed complaints<sup>1</sup> in two consolidated cases against the respondents-defendants alleging a conspiracy to drive out of business Laker Airways Limited ("Laker"), a low-fare transatlantic airline operator engaged in commerce between the United States and the United Kingdom in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The defendants include Laker's airline competitors and other members of the alleged conspiracy.

The defendants moved to dismiss the complaint for failure to state a claim for which relief can be granted

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<sup>1</sup> The *Clifton* amended complaint contains identical substantive allegations to the *Adams* complaint. The references to the complaints herein are to the *Clifton* amended complaint which is reproduced in Appendix F.

on the basis that none of the petitioners had standing to sue under § 4 of the Clayton Act. The District Court granted the motion to dismiss. (24a) The Court of Appeals affirmed.

The complaint alleged the following facts. Certain airline defendants engaged in predatory pricing aimed at eliminating Laker's low fare competition. Complaint ¶ 27a, 38a. Despite these efforts, Laker remained profitable and substantially enlarged its operations. Complaint ¶¶ 28-31, 38a-40a.

In 1981, the precipitous drop in the U.S. dollar value of the pound sterling affected Laker's ability to pay its dollar debts. In May 1981, Laker realized it might be unable to meet its aircraft loan repayments. Complaint ¶ 33, 40a. Laker's competitors, aware of Laker's vulnerable position, launched a massive predatory fare strike. Complaint ¶ 36, 41a. Laker explained the situation to its lenders. Laker's lenders agreed to provide Laker with the finance necessary to assure its survival notwithstanding the predatory fare strike. Complaint ¶ 39, 42a.

When certain of the defendants learned of the financing agreement, they pressured Laker's lenders to deny Laker the necessary finance. Complaint ¶ 40, 42a. Laker's lenders succumbed to this pressure. Complaint ¶ 43, 43a-44a.

Without any warning to Laker, the lender defendants forced Laker to authorize its bank to call in a receiver. The receiver, alleged to be a member of the conspiracy, "immediately and in furtherance of the conspiracy, dismantled Laker Airways and fired the employees of the Laker companies." Complaint ¶ 44, 44a.

The complaints alleged that

Pursuant to this unlawful combination and conspiracy, the defendants intended to destroy the work

force of the Laker Group of Companies. It was the highly motivated, industrious Laker work force that enabled Laker to provide the large scale, low fare, low cost competition which the defendants found unacceptable.

Complaint ¶ 49, 45a. The complaints alleged that

The defendants knew or had reason to know that their unlawful conduct would injure each of the plaintiffs' business and property. The defendants intended to cause injury to each of the plaintiffs.

Complaint ¶ 50, 45a. The complaints alleged that

The airline defendants, except UTA, control the labor market for airline employment in air transportation between the U.S., U.K. and Europe. The defendants knew or had reason to know that the plaintiffs would be unable to find comparable employment after they lost their employment with Laker.

Complaint ¶ 51, 41a.

The Court of Appeals concluded that the plaintiffs alleged an antitrust injury under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). (6a-8a) The Court of Appeals then proceeded to determine whether each claimant was a "proper plaintiff."

In making the proper-plaintiff analysis, the Court of Appeals applied what it perceived to be the "guiding principle" of this Court

"to exclude as plaintiffs those whose suits might 'undermine[] the effectiveness of treble-damage suits.' *Associated General*, 459 U.S. at 545 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977))."  
(5a)

The Court of Appeals applied only three factors, "whether the injury is direct (compared to that of other victims), whether the claim for damages is 'speculative,' and whether the case presents 'the potential for duplicative recovery or complex apportionment of damages.'"

(5a-6a) The Court of Appeals rejected as a factor in the proper-plaintiff analysis the defendants' alleged specific intent to injure the plaintiffs. (6a, n.4).

In considering directness of the injury, the Court of Appeals found that "the harm to plaintiffs is one step removed from the harm to Laker." (9a) The Court of Appeals classified plaintiffs' injuries as "indirect." (9a)

The court below identified "superior plaintiffs"—"both Laker itself and consumers of transatlantic air transportation." (12a) Notwithstanding that Laker and the consumers were no longer potential plaintiffs because they had sued and settled their claims, the Court of Appeals nevertheless found that they existed and that their "existence" militates "significantly" against standing for these plaintiffs. (12a-13a)

In considering the character of plaintiffs' damages, the Court of Appeals found,

Their job losses are real ones, and, as noted above, the expansion of output to competitive levels would (other things being equal) tend to increase their wages. (13a)

The Court of Appeals, nevertheless, found the plaintiffs' damage claims to be a negative factor because of various complexities of proof: the possibility that plaintiffs may secure more lucrative jobs, whether Laker would have survived and employed them in a market free of anticompetitive restraints, how long they would have remained with Laker, what advancement, what salary increases, etc. (13a)

Finally, the Court of Appeals considered the risk of duplicative recoveries and apportionment of damages. The Court of Appeals recognized that this case does not raise the risk of duplicative *recoveries* or apportionment of the same *damages* as in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977). (15a) The Court of Appeals found a risk of *conflicting premises* if, instead of previously set-

tling, Laker and the consumers had joined their claims with the present plaintiffs. The Court of Appeals said that Laker's damages were premised on high profits, the consumers' damages were premised on Laker's fares being exceptionally low, and the employees' damages are premised on "plentiful jobs and generous salaries and benefits." (15a)<sup>2</sup>

The Court of Appeals reasoned that the claims of Laker and the consumers, albeit previously settled, would have to be joined with the instant claims of the former Laker employees: "Without joinder it is impossible to avoid liability on inconsistent theories." (15a) The Court of Appeals concluded that such joinder would result in "increased complexity and litigation costs for the directly injured parties." (15a) The Court of Appeals concluded that "allowance of the suit would load the direct victims' action with costly excess baggage." (16a)

Having found these plaintiffs' injuries indirect, their damage cases complex, and the need to avoid loading the direct victims' actions with excess baggage, the Court of Appeals concluded that the "controlling factors under *Associated General* compel the conclusion that plaintiffs lack standing." (16a)

#### **REASONS FOR GRANTING THE WRIT**

A writ of certiorari should be issued in this case not only because the decision conflicts with the intent of Congress in enacting § 4 of the Clayton Act as explicated in this Court's prior decisions, but because it presents a perfect factual situation for resolving the conflict among the circuits on the antitrust standing of participants in a

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<sup>2</sup> The Court of Appeals did not explain why it considered these premises inconsistent. Nor did the Court of Appeals refer to the allegation in the complaints that Laker had realized profits, while charging low fares and providing jobs to these plaintiffs at competitive wages. Complaint ¶ 28, 38a-39a.

restrained market who are neither competitors of the defendants nor consumers.

These plaintiffs are sellers or providers of services in the transatlantic air transportation market and, as such, are participants in that market. Their injuries result, as the Court of Appeals found, from anticompetitive restraints in the transatlantic air transportation market. (6a-8a) The complaint alleges, as the Court of Appeals observed, that the firing of these plaintiffs by a coconspirator "was vital to the alleged conspiracy because the competitive threat Laker posed would not die until the work force was dismantled." (9a)

The plaintiffs were also injured as a result of restraints in the intimately related market for airline jobs. As the court below observed, the plaintiffs' failure to obtain comparable employment "suggests a direct loss from the contraction of output" in the transatlantic air transportation market. (6a)

These plaintiffs are thus in a position similar to the sugar beet growers who were held to have standing to maintain a treble-damage action in *Mandeville Island Farms, Inc. v. Sugar Co.*, 334 U.S. 219 (1948), against refiners who had allegedly conspired to fix the prices they would pay for the beets. They are also in the position of the bank in the hypothetical in the Court's opinion in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 484 n. 21 (1985), which suffered an assumed secondary boycott by the conspiring psychiatrists until it ceased making loans to the psychiatrists' intended victims, the psychologists. The Court unanimously agreed that the hypothetical bank would have standing to sue under § 4 of the Clayton Act.

This case focuses the conflict among the circuits since *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). If this case had been decided by the 9th Circuit, the plaintiffs would probably have been found to have

standing. See *Los Angeles Memorial Coliseum Commission v. National Football League*, 791 F.2d 1356 (9th Cir. 1986), cert. denied *sub nom. National Football League v. Oakland Raiders, Ltd.*, 108 S.Ct. 92 (1987), and *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), cert. dismissed, 469 U.S. 1200 (1985). Indeed, in an antitrust suit filed in the Central District of California by a distributor of Laker tickets for injuries resulting from Laker's demise, the 9th Circuit affirmed dismissal of the distributor's claims for lack of antitrust standing.<sup>3</sup> Being aware of the instant suit by Laker's former employees, the 9th Circuit said that the instant plaintiffs, like Laker itself and the consumers,

are all in a better position to assert harm than [the distributor] and to vindicate the public interest in remedying antitrust violations. (31a)<sup>4</sup>

Similarly, if this suit had been brought in the 2nd Circuit, the court that decided *Crimpers Promotion, Inc. v. Home Box Office, Inc.*, 724 F.2d 290 (2d Cir. 1983), cert. denied, 467 U.S. 1252 (1984), would have probably found that the instant plaintiffs have § 4 standing. In *Crimpers*, the 2nd Circuit Court of Appeals held that not only competing producers of cable TV programs and buyers of cable programs had standing to sue for restraints of trade in the production of cable TV programs, but also the promoter of a trade show whose single trade show had been allegedly ruined by the producer-defendants, had standing to sue under § 4 of the Clayton Act.

Assuredly, these plaintiffs would have been found to have standing by the 4th Circuit Court of Appeals that decided *McCready v. Blue Shield of Virginia*, 649 F.2d

<sup>3</sup> *Brian Clewer, Inc. v. Pan American World Airways*, No. 86-6003 (9th Cir. 1987), attached as Appendix E hereto.

<sup>4</sup> To use the language of the Court of Appeals in the instant case, the former Laker employees would be "superior plaintiffs" along with Laker Airways and the consumers.

228 (4th Cir. 1981), *aff'd, Blue Shield of Virginia v. McCready, supra.* The 4th Circuit held that not only the psychologists<sup>5</sup> but also the patient of a psychologist who was merely the beneficiary of her employer's Blue Shield Plan had standing under § 4.

On the other hand, the 3rd Circuit,<sup>6</sup> 5th Circuit,<sup>7</sup> 6th Circuit,<sup>8</sup> 8th Circuit,<sup>9</sup> and the 11th Circuit<sup>10</sup> would have probably decided this case the same way the D.C. Circuit did.

The courts of appeals have divided into two schools. One school reads *Associated General Contractors* as affirming the broad reach of § 4 of the Clayton Act as explicated in pre-*Associated General Contractors* cases. For example, the 2nd Circuit in *Crimpers* read *Associated General Contractors* as affirming the broad, remedial reach of the treble-damage remedy in earlier cases. 724 F.2d at 293.

The other circuits find in *Associated General Contractors* an endorsement of the "Chicago school" approach that § 4 is a tool to set economically rational limits on the size of treble damage liability and on the frequency of antitrust litigation. See Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445 (1985); R. Bork, *The Antitrust Paradox* (1978).

<sup>5</sup> *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980).

<sup>6</sup> See *Gregory Marketing Corporation v. Wakefern Food Corporation*, 787 F.2d 92 (3d Cir.), *cert. denied*, 107 S.Ct. 87 (1986).

<sup>7</sup> See *Campbell v. Wells Fargo Bank*, 781 F.2d 440 (5th Cir.), *cert. denied*, 106 S.Ct. 2279 (1986).

<sup>8</sup> See *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983).

<sup>9</sup> See *McDonald v. Johnson & Johnson*, 722 F.2d 1370 (8th Cir. 1983), *cert. denied*, 469 U.S. 870 (1984).

<sup>10</sup> See *Palazzo v. Gulf Oil Corporation*, 764 F.2d 1381 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 799 (1986).

For example, the 8th Circuit in *McDonald v. Johnson & Johnson*, 722 F.2d 1370 (8th Cir. 1984), cert. denied, 469 U.S. 870 (1984), saw the Court as directing the lower federal courts to be more restrictive, and merely acknowledging in *Associated General Contractors* "that earlier Supreme Court cases have read the statute expansively. *Id.* at 904. See, e.g., *Mandeville Farms v. Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948)." 722 F.2d at 1373.

The instant opinion of the D.C. Circuit is a paradigm of the view that the "guiding principle" to illuminate the application of the factors set forth in *Associated General Contractors* is to determine which plaintiffs are "superior plaintiffs", and which plaintiffs are "inferior plaintiffs" whose treble-damage suits must be dismissed because they "might undermine the effectiveness of treble-damage suits." (5a) The court below found the basis for the "relative approach" to standing under § 4 in "the entire logic" of *Associated General Contractors*: "it is in large part to preserve the effectiveness of the superior plaintiffs that the inferior plaintiffs are denied standing." (12a)

This case presents in the starkest form the issue of the compatibility of the "Chicago school" approach to § 4 with this Court's prior decisions. The court below appreciated that the "superior plaintiffs" no longer exist as plaintiffs because their claims have been dismissed after settlement. The Court of Appeals applied pure economic theory to deny standing to the instant "inferior plaintiffs." The claims of the instant plaintiffs cannot possibly complicate the suits of the "superior plaintiffs."

The preservation of the "effectiveness" of the suits of the "superior plaintiffs" is not effectiveness in a real sense. "Effectiveness" is a catch-word for setting economically rational limits on the size of treble damage liability arising out of anticompetitive conduct. It is an undisciplined, essentially intuitive judicial determination

to limit the number of treble damage antitrust suits the courts will entertain.

The courts of appeals that share the view of the D.C. Circuit that “[t]he Court’s guiding principle has been to exclude as plaintiffs those whose suits might undermine[] the effectiveness of treble-damage suits,” weight and apply the factors from *Associated General Contractors* to limit the availability of the treble-damage remedy.

They, like the court below (12a-13a), see the existence of other, more directly injured plaintiffs as sufficient justification to exclude a plaintiff they perceive as less directly injured. See, e.g., *Gregory Marketing Corp.*, *supra*, 787 F.2d at 97; *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1083, 1087 (6th Cir. 1983); *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 443 (5th Cir.), cert. denied, 106 S.Ct. 2279 (1986); *Palazzo v. Gulf Oil Corporation*, 764 F.2d 1381, 1388 (11th Cir. 1985), cert. denied, 106 S.Ct. 799 (1986); *McDonald v. Johnson & Johnson*, 722 F.2d 1370 1379 (8th Cir. 1983), cert. denied, 469 U.S. 870 (1984).

Courts that rank plaintiffs as superior and inferior read *Associated General Contractors* as having expanded *Illinois Brick* beyond the problem of apportionment of a common fund of damages. The court below clearly articulates the proposition that *Illinois Brick* should be extended to bar § 4 litigation by different plaintiffs seeking different damages, if there is merely the risk of conflicting premises in the suits of different claimants. (15a)

Like the D.C. Circuit in the instant case, (15a-16a), adherents of the expansion of the *Illinois Brick* rule, hypothesize that the plaintiffs seeking different damages join their claims in a single suit, and appraise this combined litigation as too expensive. See *Gregory Marketing Corp.*, *supra*, 787 F.2d at 97-98.

In other words, the economic theorists have concluded that this Court in *Associated General Contractors* di-

rected them to base their decision on "uniform principles," not on the facts of the case before them. (16a) Such an approach could not have been directed by this Court. It transgresses the limits of judicial power in Article III of the Constitution "which restricts judicial power to 'cases' and 'controversies'." *Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970).

In their march to use § 4 to limit the size of potential treble-damage liability and to limit the frequency of antitrust litigation, the factors set forth in *Associated General Contractors* are torn from their foundations and, in some cases thrown away. The court below eliminated as a factor the alleged specific intent of the defendants to injure these plaintiffs. Recognizing that in so doing it was in conflict with the 9th Circuit decision in *Los Angeles Memorial Coliseum Commission v. National Football League*, *supra* 791 F.2d at 1363, the Court of Appeals read *Associated General Contractors* "as saying only that a showing of such intent may be required to establish an antitrust violation (and thus necessary to avoid a motion to dismiss, . . . ), and may help focus the standing analysis." (6a, n.4).

In *Associated General Contractors*<sup>11</sup> the "directness or indirectness" factor involved a discreet analysis of the specific facts alleged in each case to assess the relationship of the victim to the defendants' unlawful conduct. The court below has converted this factor into a test of the relative strength and weakness of a victim's claim when measured against the possible injury to other hypothetical victims. The court below restated this factor as "whether the injury is direct (compared to that of other victims)." (5a)

In appraising the damages claimed, adherents of the "Chicago school" go beyond the kind of problem ad-

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<sup>11</sup> 459 U.S. at 540.

dressed in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-63 n. 14 (1972) (measurement of an injury to the general economy of a state), and, like the court below (13a-14a), consider complexity or difficulty in proving damages as a disqualifying factor. See, e.g., *Southhaven Land Co., Inc. v. Malone & Hyde, Inc.*, *supra*, 715 F.2d at 1088 n.12. This approach overrules, in effect, *Story Parchment Co. v. Patterson Paper Co.*, 282 U.S. 555 (1931).

Similarly, the standard of "judicially manageable limits" articulated by the Court in *Associated General Contractors*, *supra*, 459 U.S. at 543, has been extended to exclude suits under § 4 that may theoretically "tend to complicate" suits by "superior plaintiffs." The court below held that this Court "requires exclusion of marginally injured parties whose claims tend to complicate the litigation and thereby impair the effective enforcement of the antitrust laws." (14a, emphasis added). The required exclusion obtains even where, as here, there is no possibility of joinder of the claims of the "superior plaintiffs," because their claims were dismissed with prejudice.

#### CONCLUSION

The Court has declared that Congress intended § 4 of the Clayton Act as a "remedial provision." *Associated General Contractors*, 459 U.S. at 530. In *McCready*, the Court said, "Consistent with the congressional purpose, we have refused to engraft artificial limitations on the § 4 remedy." 457 U.S. at 472.

It will be hard for the Court to find a clearer and more articulate application of the economic approach to standing under § 4 of the Clayton Act than the instant decision. It will be hard to find a better set of facts than those presented by the instant case to resolve the fundamental differences among the circuits.

The availability of the protection of the antitrust laws is undoubtedly an important question of federal law. The diverging paths of the courts of appeals on whether § 4 standing is to be determined on the basis of an undisciplined, intuitive judgment of the effect of a treble-damage suit by victims who have suffered antitrust injury on the hypothetical suits of "superior plaintiffs," has not been, but should be settled by this Court. A writ of certiorari should be issued.

Respectfully submitted,

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January 21, 1988

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## **APPENDICES**

WAGENHEIMER

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 86-5468

DAVID WEAVER ADAMS, *et al.*,  
*Appellants*  
v.

PAN AMERICAN WORLD AIRWAYS, INC.,  
a domestic corporation, *et al.*

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No. 86-5469

JOHN ERIC CLIFTON, *et al.*,  
*Appellants*  
v.

PAN AMERICAN WORLD AIRWAYS, INC.,  
a domestic corporation, *et al.*

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No. 86-5538

JOHN ERIC CLIFTON, *et al.*,  
v.

PAN AMERICAN WORLD AIRWAYS, INC.,  
a domestic corporation, *et al.*  
UNION DE TRANSPORTS AERIENS,  
*Appellant*

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No. 86-5540

DAVID WEAVER ADAMS, *et al.*

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

a domestic corporation, *et al.*

UNION DE TRANSPORTS AERIENS,

*Appellant*

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Appeals from the United States District Court  
for the District of Columbia

(Civil Action Nos. 86-00304 and 86-00629)

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Argued March 20, 1987

Decided September 1, 1987

*Robert M. Beckman*, with whom *David M. Kirstein* was on the brief for appellants, David Weaver Adams, *et al.* in Nos. 86-5468 and 86-5469.

*Sidney S. Rosdeitcher*, with whom *Leonard M. Bebchick*, *Gary D. Wilson*, *Carol Lee*, *Robert B. von Mehren*, *Robert J. Geniesse*, *Fred D. Turnage*, *Michael W. Dolan*, *Douglas Rosenthal*, *Willard K. Tom*, *James J. Murphy*, *David G. Feher*, *Lawrence A. Short*, *William Karas*, *David H. Coburn*, *Robert J. Higgins*, *James van R. Springer*, *Eugene M. Goott*, *John W. Dickey*, *Mark McCall*, *Veselin M. Scekic*, *Robert Fabrikant* and *Celestino Pina* were on the brief for appellees, Pan American, *et al.* in Nos. 86-5468 and 86-5469.

*Sanford C. Miller*, with whom *Maurice J. Moyer* and *John McConnell* were on the brief for Union de Transports Aeriens, cross-appellant in Nos. 86-5548 and 86-5540 and appellee in Nos. 86-5468 and 86-5469.

*Jacob A. Stein*, with whom *Patrick A. Malone* was on the brief for cross-appellee, Robert Beckman, in Nos. 86-5540 and 86-5538. *George T. Manning* and *Charles P. Murdter* also entered appearances for cross-appellee.

Before: RUTH B. GINSBURG and WILLIAMS, *Circuit Judges*, and McGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge WILLIAMS*.

**WILLIAMS, Circuit Judge:** This action is the fourth in a series of antitrust suits spawned by the collapse of Laker Airways Limited. The core allegation in each suit is that a group of airlines, an aircraft manufacturer and the latter's subsidiary conspired to drive Laker out of business, in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1982 & Supp. III 1985).<sup>1</sup> The first set of actions, *Laker I*,<sup>2</sup> was brought by Laker itself and culminated in a settlement requiring defendants to pay substantial sums to Laker's stockholders, creditors, and attorneys. See *Adams v. Pan American World Airways, Inc.*, 640 F. Supp. 683, 684 (D.D.C. 1986). The second, *Laker II*, was initiated by a class of transatlantic travelers asserting that the destruction of Laker forced them travel on more expensive airlines. This too was settled, with the defendants establishing a fund to provide plaintiffs reduced airfares for a five-year period. *In re Atlantic Air Travel Antitrust Litigation*, No. 84-1013, mem. order (March 18, 1986 D.D.C.) (approving settlement). The third, *Laker III*, was brought by a travel agent claiming that the demise of Laker caused it to lose business. This action was dismissed for want of standing.

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<sup>1</sup> The persons named as defendants vary slightly from case to case.

<sup>2</sup> *Laker Airways Ltd. v. Pan American World Airways, Inc.*, No. 82-3362 (D.D.C. filed Nov. 24, 1982); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, No. 83-0416 (D.D.C. filed Feb. 15, 1983); *Laker Airways Ltd. v. Union de Transport Aeriens*, No. 83-2791 (D.D.C. filed Sept. 22, 1983).

*Brian Clewer, Inc. v. Pan American World Airways, Inc.*, No. 86-119 (C.D. Cal. May 21, 1986), *aff'd*, No. 86-6003 (9th Cir. Feb. 12, 1987).

Plaintiffs in the present action, a group of 313 former Laker employees,<sup>3</sup> allege that the illegal conspiracy cost them their jobs. As recompense they seek treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15 (1982). The District Court concluded that plaintiffs lacked standing to bring an antitrust action and granted defendants' motion to dismiss. *Adams v. Pan American World Airways, Inc.*, 640 F. Supp. at 684-86. We affirm.

## I.

Section 4 of the Clayton Act permits "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to bring a treble-damages action. 15 U.S.C. § 15(a). This language, however, has never been read literally to allow suit by every party affected by an antitrust violation's "ripples of harm." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-77 (1982).

The first prerequisite to maintaining a § 4 action is that the plaintiff have suffered the *kind* of injury the antitrust laws were designed to prevent. "The antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in original). Thus, only harm stemming from a reduction in competition qualifies as injury cognizable under the antitrust laws. *E.g.*, *id.*; see also *Cagill, Inc.*

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<sup>3</sup> Plaintiffs represent the full range of personnel employed by a major airline, from pilots and flight attendants to managers, administrators and reservation agents, to engineers, mechanics and shop personnel. *Adams* Complaint ¶¶ 3-300M, Joint Appendix ("J.A.") at 44-150.

v. *Monfort of Colorado, Inc.*, 107 S. Ct. 484 (1986) (extending *Brunswick* to claim for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (1982)).

In addition to alleging "antitrust injury," the would-be claimant must show that it is a "proper plaintiff." See *Cargill*, 107 S. Ct. at 489 n.5; *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-46 (1983). The Court's guiding principle has been to exclude as plaintiffs those whose suits might "undermine[] the effectiveness of treble-damages suits." *Associated General*, 459 U.S. at 545 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977)). Claims of remote victims could severely complicate an action by more direct ones, raising the latter's costs of suit. Further, the interest in avoiding multiple recoveries may force courts to reduce awards to the direct victims. These impairments of direct victims' incentive to sue could jeopardize the effectiveness of the treble-damage claim. *Associated General*, 459 U.S. at 544-46; *Blue Shield of Virginia v. McCready*, 457 U.S. at 475 n.11; *Illinois Brick*, 431 U.S. at 745; cf. *Cargill* 107 S. Ct. at 489-90 nn.5, 6 (such concerns less relevant to suit for injunctive relief under § 16 of the Clayton Act, as duplicative lawsuits and multiple recoveries not involved). See generally Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1483-98 (1985); Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. Chi. L. Rev. 602, 608-25 (1979).

Accordingly, once plaintiff has crossed the threshold by alleging a genuine antitrust injury (one deriving from a decrease in competition), the Court directs us to consider such factors as whether the injury is direct (compared to that of other victims), whether the claim for damages is "speculative," and whether the case presents "the potential for duplicative recovery or complex apportionment

of damages." *Associated General*, 459 U.S. at 545; see also *id.* at 538-45.<sup>4</sup>

While plaintiffs allege an antitrust injury, we find that the other factors controlling under *Associated General* preclude accepting them as proper plaintiffs.

## II.

### A. Antitrust Injury

The only market where an illegal restraint is alleged to have taken place is the transatlantic air transportation market. Amended *Adams* Complaint ¶ 46, Joint Appendix ("J.A.") at 217-18. Plaintiffs supply services (their labor) to competitors selling in that market. While decreased competition will almost invariably harm consumers, its effects on suppliers such as plaintiffs are quite complex. Output is greater at competitive levels than in a cartelized market; everything else being equal, a competitive industry will require more employees, increasing job opportunities for persons such as plaintiffs. Indeed, plaintiffs represented at oral argument that *none* among them had managed to obtain employment comparable to that previously held with Laker. This suggests a direct loss from the contraction of output.

The effects do not stop there, however. Competition might conceivably raise wages. The more workers de-

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<sup>4</sup> Plaintiffs vigorously assert that under the rubric of *Associated General* the defendant's specific intent to injure plaintiff is also a factor in the proper-plaintiff analysis. Although plaintiffs' position has some supporting precedent, see *Los Angeles Memorial Coliseum Commission v. National Football League*, 791 F.2d 1356, 1363 (9th Cir. 1986), we read *Associated General* as saying only that a showing of such intent may be required to establish an antitrust violation (and thus necessary to avoid a motion to dismiss, see *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 & n.19 (1948)), and may help focus the standing analysis. See *Associated General*, 459 U.S. at 537 & nn.35-37.

manded (to handle higher output), the more lucrative the alternative occupations from which workers must be attracted, and the higher the wages needed to attract them. But competition also generates strong pressure to cut costs, including wages. *Associated General*, 459 U.S. at 539; cf. S. MORRISON & C. WINSTON, THE ECONOMIC EFFECTS OF AIRLINE DEREGULATION 43-46 (1986).<sup>5</sup> Workers as a group thus may well expect to do better in a cartelized industry, and may even seek to bring about cartelization.<sup>6</sup> See *Associated General*, 459 U.S. at 539-40.

We cannot now determine (and probably could not even after trial) whether plaintiffs' gains from reduced competition predominate over their losses. An accurate assessment of the alleged cartelization's effect would require computation of the present discounted value of the net change in their expected income streams.<sup>7</sup> Even a Laker employee who has not yet obtained similar employment may do so tomorrow; if cartelization in fact raises wages, it may do so sufficiently to offset the present value of his losses (both those incurred before suit

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<sup>5</sup> The study finds a negative effect on wages. For the airlines, of course, decartelization was an aspect of deregulation. Regulation of prices on a cost-of-service basis has an independent tendency to relax cost control efforts, as firms can keep only a portion of their cost savings, so the case is not a pure test of the effects of increased competition.

<sup>6</sup> Plaintiffs describe themselves as members of a "highly competent and highly motivated work force" willing to work for less than their counterparts employed by defendants. See Brief of Plaintiffs at 6. This does not support an inference that they are necessarily net losers from cartelization. If they have those attributes, they will surely be attractive candidates for jobs opening up in the cartelized transatlantic market.

<sup>7</sup> The "expected" value of gains from cartelization would refer to the incremental wage income, discounted for the possibility that the plaintiff may secure no job because of the reduced output in the market as a whole.

and expected to be incurred thereafter). On the other hand, it may not.

We believe that plaintiffs can properly be said to have alleged an antitrust injury—the failure to secure employment comparable to their Laker jobs from the date of Laker's folding to the filing of the complaint. Thus they have crossed the *Brunswick* threshold. But the ambiguity of cartelization's effects on their welfare fatally affects their case under the remaining factors pinpointed by *Associated General*.

#### B. *Directness of Injury*

Comparison of this case with *Associated General* is complicated by "the absence of specific allegations" there. 459 U.S. at 541 n.46. But the Court discerned two possible theories, one of which closely parallels the present case:<sup>8</sup> defendant association of contractors illegally coerced the victim landowners, who switched from victim union contractors to contractors employing non-union workers; the union contractors reduced hiring, causing workers to be less ready to join plaintiff union and pay dues. 459 U.S. at 541 n.46. Here the chain is shorter: the victim Laker collapses; plaintiff employees lose their jobs. There is no need for a link paralleling the final one of *Associated General*, i.e., workers responding by greater resistance to plaintiff.

But the Court appeared to denigrate the significance of the final necessary link. It observed that the harm to the union was "even more indirect than the already in-

<sup>8</sup> In the alternative theory, defendant association of contractors illegally coerced the victim landowners, who as a result switched to non-union contractors, who resisted plaintiff union's organizing efforts in order to avoid loss of business. The Court characterized this as involving injury from "the conduct of persons who are not victims of the conspiracy [the non-union contractors, who were in fact indirect beneficiaries of the conspiracy]," *id.* Plaintiffs' claim here cannot fairly be said to involve a link of that sort.

*direct injury to its members*, yet a number of decisions have denied standing to employees with merely derivative injuries." *Id.* at 541 n.46 (citations omitted) (emphasis added).

Plaintiffs here characterize the conspiracy as reaching the employees themselves. They claim that the illegal restraint weakened Laker to the point that it had to accept a coconspirator as receiver and that the coconspirator fired plaintiffs. Plaintiffs contend that this last step was vital to the alleged conspiracy because the competitive threat Laker posed would not die until the work force was dismantled.

This effort to remove the Laker link from the chain seems largely a matter of word play. The conspirators allegedly forced Laker to its knees. Whenever that happens to a firm, the web of contracts and relationships which form the essence of the firm will be dismantled. Astute counsel should not be able, merely by feats of characterization, to confer standing on all participants in that web.

However the final dismissal may be labelled, the harm to plaintiffs is one step removed from the harm to Laker. It follows that their claim will be more difficult to develop and prove. See Posner & Landes, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. Chi. L. Rev. 602, 609-15 (1979) (comparing cost to indirect purchasers and direct purchasers of bringing an overcharge case). These difficulties, already alluded to, are discussed further in parts II.C and II.D below. It is a natural consequence of the extra link in the chain.

Nine years ago this court plainly classified injuries such as plaintiffs' as indirect: "Outside the context of professional sports, courts have regularly denied employees standing to sue for antitrust injuries to their employer, generally on the ground that any injury to the

employee is 'indirect.' " *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 n.2 (D.C. Cir. 1978) (citation omitted). Cf. *Illinois Brick*, 431 U.S. 744-47 (indirect purchasers lack standing to raise antitrust claims).<sup>9</sup> Employees in professional sports have surmounted the standing inquiry simply because their injuries have stemmed at least in part from restraints in the *labor market itself*. See, e.g., *Radovich v. National Football League*, 352 U.S. 445 (1957) (plaintiff allegedly blacklisted from employment); *Smith v. Pro Football, Inc.*, *supra* (plaintiff challenging system of restraints on his ability to sell his services to full range of competitors in market). Plaintiffs allege no such restraint in the airline labor market. Cf. *Associated General*, 459 U.S. at 527 & n.14 (plaintiff union alleged only a restraint in market for construction contracting and subcontracting and not in market for labor union services).

In a rare handful of cases courts have found standing for employees in the absence of restraints in the labor market. In *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), plaintiff was the victim of a boycott in the labor market, *id.* at 742-44, but the court also found separately that he had standing because his participation was essential to execution of the conspiracy and that no other party had so strong an incentive to vindicate the public interest in enforcement. *Id.* at 746-47.<sup>10</sup> See also

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<sup>9</sup> Unlike *Illinois Brick*, which flatly precludes indirect purchasers from bringing antitrust actions in virtually all cases, *Associated General* does not go so far as to say that suppliers of an input never have standing to assert a claim for damages resulting from illegal restraints in their purchaser's market. See 459 U.S. at 540-42.

<sup>10</sup> A prior decision in *Ostrofe*, 670 F.2d 1378 (9th Cir. 1982), was vacated and remanded by the Supreme Court for reconsideration in the light of *Associated General*. See 460 U.S. 1007 (1983). After the decision on remand, defendants applied for certiorari, but the case was dismissed at the request of the parties. See 469 U.S. 1200 (1985).

*Donahue v. Pendleton Woolen Mills, Inc.*, 633 F. Supp. 1423 (S.D.N.Y. 1986) (finding standing for employees coerced into participating in illegal scheme). *But see Bichan v. Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982) (employee denied standing under similar circumstances), cert. denied, 460 U.S. 1016 (1983). Obviously the special circumstance deemed controlling in *Ostrofe* and *Donahue*, even if we assume it is sufficient under *Associated General*, is absent here.

One decision antedating *Associated General* is probably not susceptible of any principled distinction. In *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967), the plaintiff was employed in the business of marketing magazine subscriptions to educational institutions under a "school plan," by which such institutions use students to sell subscriptions to the public. He received a salary and commission. He lost his job following the acquisition of his employer in a merger, allegedly illegal, between two of the three largest firms in the field. The court appeared to apply two criteria. First, on the basis of plaintiff's entitlement to commissions, it found that he operated as a business rather than as a mere employee. Second, it applied a vague "proximate cause" test and stated in conclusory form that the injury was direct enough. We doubt if the case survives *Associated General*: (1) the first point has no apparent significance under *Associated General*; (2) the classification of the injury as direct seems inconsistent with *Associated General*'s conclusion; and (3) the decision wholly disregards the other factors and policy values identified by *Associated General* as controlling.<sup>11</sup> Cf. *Eagle v. Star-Kist*

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<sup>11</sup> *International Association of Heat & Frost Insulators & Asbestos Workers v. United Contractors Association, Inc.*, 483 F.2d 384 (3rd Cir. 1973), amended, 494 F.2d 1353 (3rd Cir. 1974), bears some resemblance to *Associated General*, though with the opposite outcome. Accordingly, we also doubt its viability. We note, however, that there were allegations of anticompetitive effects in the labor market itself, through use of sham agreements to thwart the plaintiff unions' organizational efforts. See *id.* at 392, 396.

*Foods, Inc.*, 812 F.2d 538 (9th Cir. 1987) (applying *Associated General* criteria to deny standing to employees compensated on share-of-revenue basis).

Thus, in the absence of special circumstances not present here, the cases provide no support for suit by employees of a firm victimized by antitrust violations.

Finally, the general rule against employee standing in cases involving no restraint in the labor market finds support in *Associated General*'s suggestion that directness is a relative matter:

The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general.

459 U.S. at 542. Of course the entire logic of *Associated General* supports such a relative approach: it is in large part to preserve the effectiveness of the superior plaintiffs that the inferior ones are denied standing.

Here superior plaintiffs clearly exist—both Laker itself and consumers of transatlantic air transportation. Indeed, they have already asserted claims in their own rights, received substantial settlement payments, and vindicated the public interest in antitrust enforcement.<sup>12</sup> Compare *Ostrofe v. H.S. Crocker Co.*, 740 F.2d at 746-47 (no one else had as strong an interest as discharged employee in vindicating public interest in antitrust enforcement) (alternative holding). Elusive as the concept

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<sup>12</sup> Plaintiffs argue that because their injuries are discrete from those of Laker and its passengers, the latters' actions have not vindicated the public interest in antitrust enforcement, i.e., their claims are not large enough to be an optimal deterrent. In fact, as we develop below, there is a high probability of substantial overlap between plaintiffs' injuries and those of Laker and its passengers.

of directness may be, we believe that the existence of immediate victims that suffer far less ambiguous anti-trust injury militates significantly against standing for these plaintiffs.

### C. *Speculate Damages*

We have already suggested the speculative character of plaintiffs' damages. Their job losses are real ones, and, as noted above, the expansion of output to competitive levels would (other things being equal) tend to increase their wages. But cartel participants' comparative laxity as to costs suggests that they may well ultimately secure more lucrative jobs than those that would have been available in the more competitive industry that would have resulted from the survival of Laker.

Nor is the level of competition in the industry the only relevant variable. In part plaintiffs' economic fate was tied specifically to Laker; we cannot assume its indefinite survival in an exceptionally volatile industry characterized by frequent mergers and bankruptcies, *see Adams v. Pan American World Airways, Inc.*, 640 F. Supp. at 685. Further, the prosperity of each of the 313 plaintiffs would depend on how long he or she would have remained with Laker, with what advancement, what salary increases, etc. Finally the court would need to consider each plaintiff's prospects of obtaining comparable employment in aviation or other industries.<sup>13</sup>

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<sup>13</sup> Plaintiffs focus on their inability to obtain employment in the cartelized transatlantic air transportation market. We see no reason why they are so limited. All of them are qualified for employment in other air transportation markets, and many of their jobs with Laker have exact equivalents outside the air transportation industry.

Plaintiffs also claim to have suffered from emotional distress. If for some reason not revealed to us such injury qualified as an injury to plaintiffs' "business or property," its measurement would further complicate the litigation.

Plaintiffs in essence recognize the complexity of calculating their damages but claim that assessing "damages in this case is no more speculative, abstract or impractical than in personal injury cases where assessment of lost past and future earnings are routinely made by the jury." Brief of Plaintiff at 39 (citing *District of Columbia v. Barriteau*, 399 A.2d 563 (D.C. App. 1979)). But the present claim is in antitrust, not tort. Here injury turns on the impact of the alleged wrong on the relevant market itself, so that the fact finders cannot take a market structure as given, as they would in a personal injury litigation. Moreover, *Associated General* requires exclusion of marginally injured parties whose claims tend to complicate the litigation and thereby impair the effective enforcement of the antitrust laws. See, e.g., *Associated General*, 459 U.S. at 543-45.

#### D. Risk of Duplicative Recoveries or Complex Apportionment of Damages.

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that an indirect customer could not bring a treble-damage action for price increases deriving from sales to its suppliers in violation of the antitrust laws. Recognizing that multiple recovery should be avoided, it noted that allowance of indirect purchaser suits would compel apportionment of the recovery. Besides adding complexity to the case, this apportionment would cut down the direct purchasers' recovery and diffuse the incentive to bring treble-damage actions. *Id.* at 735-48; see also *Associated General*, 459 U.S. at 544.

The present case raises a similar risk of leading either to multiple recovery or to unduly complex litigation. In *Illinois Brick*, the potential conflict was over a single amount, the illegal overcharge; to avoid multiple recoveries, it would be necessary to divide that amount be-

tween direct and indirect purchasers on some consistent theory governing the extent to which direct purchasers would pass on the overcharge and the damage recovery. Separate litigations would allow direct purchasers to recover on one set of assumptions as to elasticities, market structure and market behavior, indirect purchasers to recover on another set. See 431 U.S. at 741-42. This would generate powerful claims for joinder of all potential plaintiffs under Federal Rule of Civil Procedure 19, massively complicating the litigation. *Id.* at 737-41.

Here, concededly, there is no common fund in the sense of the overcharge at stake in *Illinois Brick*. But the problem of conflicting premises is no different. In *Laker I*, Laker's creditors, stockholders, and attorneys sought damages premised on a projection of high profits for Laker. In *Laker II*, Laker's passengers asserted damages premised on Laker's fares being exceptionally low. Laker's employees now seek to collect damages premised on plentiful jobs and generous salaries and benefits. Without joinder it is impossible to avoid liability on inconsistent theories; with joinder would come increased complexity and litigation costs for the directly injured parties.

One may, indeed, conceptualize the case as involving claims on a single quantity of wealth—the increased consumer and producer surplus that a thriving Laker would have generated.<sup>14</sup> The risks of duplicative recoveries on

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<sup>14</sup> The extra producer surplus (especially for purposes of this case) includes any increments in plaintiffs' wage income over what they would have been able to earn without Laker's presence in the market. A worker is of course a producer. The wage necessary to attract the marginal worker sets the wage of the inframarginal workers. The latter enjoy producer surplus consisting of the difference between the prevailing wage and the wage necessary to attract them to the jobs in question. As already noted, the survival of Laker would under some circumstances increase that wage. Thus the producer surplus at issue in Laker's survival encompasses the

inconsistent theories are in no substantive way different from those risks in *Illinois Brick*. The Court regarded this concern as relevant even to *Associated General*, where the obscurity of the claim left some uncertainty as to just how plaintiffs' claims would relate to those of the direct victims. 459 U.S. at 544-45. Here, more clearly than there, allowance of the suit would load the direct victims' action with costly excess baggage.

Nor is it an answer that Laker and its passengers have already settled their claims. Standing must be determined by uniform principles, not by accidents of sequence. A rule opening the door to marginal plaintiffs after settlement would virtually force defendants not to settle until all possible complainants were brought into the action or until the statute of limitations had run. Such behavior would clearly make it more difficult to prosecute antitrust violations and "undermine[] the effectiveness of treble-damages suits." *Associated General*, 459 U.S. at 545. Besides, allowance of the present suit would unequivocally expose defendants to the risk of multiple liability, an alternative the Court has emphatically rejected. *Illinois Brick*, 431 U.S. at 730-31 (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972)). See also *id.* at 731 n.11 (recognizing that risk of multiple liability is particularly great where some parties settle).

The controlling factors under *Associated General* compel the conclusion that plaintiffs lack standing.

### III.

Before the District Court defendant Union de Transports Aeriens ("UTA") moved for sanctions against plaintiffs' attorney for signing a complaint containing

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surplus not only of Laker but also of the inframarginal workers. Ascertainment of the likely allocation of total producer surplus between these (and other suppliers as well) would be a complex task, to say the least.

false allegations in violation of Federal Rule of Civil Procedure 11. Plaintiffs' complaint, which was prepared under extreme time pressures, alleged that UTA competed with Laker in the transatlantic market. In fact, UTA's only service originating in the United States was between Los Angeles and Tahiti. When UTA called the error to plaintiffs' counsel's attention, he did not acknowledge the inaccuracy but instead seized the offensive. He claimed that UTA had raised a matter outside of the pleadings; accordingly, if the court considered UTA's allegations, it would turn UTA's pending motions to dismiss into a motion for summary judgment, thereby justifying discovery by plaintiffs. Within a short time thereafter, however, plaintiffs' counsel amended the complaint to remove the inaccuracy.

The District Court denied UTA's motion without explanation in a one-sentence footnote. Although the District Court's treatment of this matter was lamentably terse, we may overturn its ruling only if it abused its "wide discretion" to determine whether grounds exist to support Rule 11 sanctions. *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985). The record is not strong enough for us to find an abuse of discretion.

The decision below is

*Affirmed.*

**APPENDIX B**

**FOR THE DISTRICT OF COLUMBIA  
UNITED STATES DISTRICT COURT**

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Civil Action No. 86-0304

DAVID WEAVER ADAMS, *et al.*,  
*Plaintiffs,*  
v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,  
*Defendants.*

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Civil Action No. 86-0629

JOHN ERIC CLIFTON, *et al.*,  
*Plaintiffs,*  
v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,  
*Defendants.*

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[Filed June 30, 1986]

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**MEMORANDUM**

The instant action is the fourth antitrust suit growing out of the collapse of Laker Airways.<sup>1</sup> The first, and

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<sup>1</sup> This action actually represents two separate lawsuits, *Adams v. Pan American World Airways*, C.A. 86-0304, and *Clifton v. Pan American World Airways*, C.A. 86-0629, consolidated on March 3, 1986 by this Court. For practical purposes, however, this is a single action and will be referred to as such in this Memorandum.

principal action (Laker I) was brought in this Court by Laker against Pan American Airways, TWA, British Airways, British Caledonian Airways, Swissair, Lufthansa German, McDonnell Douglas, Belgian World Airways, Royal Dutch Airways, Union de Transports Aeriens and Scandinavian Airlines System.<sup>2</sup> Following complex pre-trial motions,<sup>3</sup> the parties agreed on a settlement, which yielded substantial payments to Laker's stockholders, its creditors, and its attorneys. A second lawsuit (Laker II)<sup>4</sup> was brought in this Court as a class action on behalf of individuals who claimed that they would have travelled to Great Britain on Laker Airways had it been in existence, but who used the more expensive conventional carriers instead following Laker's demise. This action was likewise settled.<sup>5</sup> The defendants established a fund from which individual transatlantic travellers during a certain period could draw for coupons which reduced transatlantic fares on certain carriers during a five-year period. A third lawsuit (Laker III) filed in the Central District of California, was brought on behalf of travel agents who claimed to have lost business as a consequence of the Laker

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<sup>2</sup> Initially these were three lawsuits, but in the course of the litigation these actions were consolidated. The three cases were assigned civil actions numbers 82-3362, 83-0416, and 83-2791.

<sup>3</sup> See *Laker Airways v. Pan American World Airways*, 604 F. Supp. 280 (D.D.C. 1984); *Laker Airways v. Pan American World Airways*, 596 F. Supp. 202 (D.D.C. 1984); *Laker Airways v. Pan American World Airways*, 577 F. Supp. 348 (D.D.C. 1983); *Laker Airways v. Pan American World Airways*, 568 F. Supp. 811 (D.D.C. 1983); *Laker Airways v. Pan American World Airways*, 559 F. Supp. 1124 (1983).

<sup>4</sup> This action consisted of five lawsuits consolidated under the caption *In re Atlantic Air Travel Antitrust Litigation*, C.A. 84-1013.

<sup>5</sup> Since this was a class action, the proposed settlement agreement in Laker II was approved by the Court following a public protest period and a hearing. *In re Atlantic Air Travel Antitrust Litigation*, C.A. 84-1013, Memorandum Order of March 18, 1986 (D.D.C.).

demise brought about by defendants' alleged antitrust conspiracy. That action was dismissed for lack of standing.<sup>6</sup>

The instant action is brought on behalf of a number of former employees of Laker Airways who claim to have been damaged as a result of the same conspiracy that was before this Court in Laker I and II and before the court in California in Laker III.<sup>7</sup> The defendants have moved to dismiss.<sup>8</sup> The Court has carefully considered the motion, the briefs in support of the motion, in opposition thereto, and in reply, the various affidavits, as well as the arguments advanced at an oral hearing, and it has concluded that the motion must be granted.

Section 4 of the Clayton Act permits recovery of damages by individuals who are injured in their business or property by reason of a violation of the antitrust laws. Notwithstanding the broad language of section 4, it is well established that persons who are only indirectly or tangentially affected by an antitrust violation may not recover under the antitrust laws. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534-35 (1983). Indeed, it is safe to generalize that, barring unusual circumstances, only consumers or competitors in the market in which trade has been restrained have standing to bring a section 4 action. *Id.* at 539. As the Supreme Court noted in *Associated General Contractors*, the antitrust laws were enacted "to assure customers" the benefit of price competition, and its central interest is the protection of the

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<sup>6</sup> *Brian Clewer, Inc. v. Pan American World Airways*, CV 86-119 CBM, May 14, 1986 (Consuelo Marshall, J.).

<sup>7</sup> The number of defendants in the various actions is not always precisely the same, but the principal defendants (Pan American, TWA, British Airways) appear in all the actions.

<sup>8</sup> In addition, defendant Union de Transports Aeriens (UTA) has requested sanctions against plaintiffs' counsel.

economic freedom of "participants in the relevant market." *Id.* at 538. Thus, it is not surprising that there is not a single reported case where employees of the victim of an antitrust violation have been allowed to recover for loss of employment resulting from the injury to the employer.

Plaintiffs rely to the contrary primarily upon two cases—*Radovich v. National Football League*, 352 U.S. 445 (1957), and *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), but neither supports their argument. Radovich, a professional football player, claimed to have been personally blacklisted by all the employers in professional football, and the Supreme Court held that on account of this group boycott his complaint did state a cause of action. The Laker employees do not and cannot allege any kind of boycott; when their employer was forced out of business, they had to look for employment elsewhere, and in this endeavor some were successful and some were not. Similarly, the allegations in *McCready* are unlike the claims made here. The market in that case was that for psychotherapeutic services, and the plaintiff was both a consumer of the services and a competitor in the restrained market. See *Associated General Contractors, supra*, 459 U.S. at 538-39. Plaintiffs here, of course, qualify under neither category. Indeed, plaintiffs do not even participate in the same market as the defendants. Laker and the airlines against which it brought suit were engaged in the market for air transportation; the plaintiffs in the instant action are sellers in the various labor markets in which the airlines are buyers.

The well-established proposition that only the direct victims of antitrust violations may recover is supported in this case by a number of relevant factors.

First. Any damages would, of necessity, be extremely speculative. That is so if only because it is not at all clear, nor could it be proved with any degree of certainty, how long Laker Airways would have been in business even if there had been no antitrust conspiracy. The airline

industry has been quite volatile in recent years; Laker's collapse occurred when other airlines were losing money; and mergers and bankruptcies have occurred with some frequency. Thus, it is not certain how long Laker would have operated, and thus how long the plaintiffs would have had employment with Laker. Beyond that, each of the plaintiffs would be faced with a second level of uncertainty with regard to his individual losses—how long he would have been employed by Laker Airways or any other airline, at what salary, with what seniority, with what job security, with what fringe benefits, and the like. Finally, plaintiffs also request damages for emotional distress—an item particularly difficult to quantify in this type of case.

Where demonstration of each plaintiff's injury and damages promises unduly long and complicated proceedings involving massive evidence and complicated theories, antitrust standing is likely to be denied. See *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *McCready, supra*, 457 U.S. at 475 n.11; *Associated General Contractors v. Carpenters, supra*, 459 U.S. at 542-44.

Second. As indicated above, the instant action is not the first to seek damages arising from the collapse of Laker Airways. The first lawsuit provided compensation to the stockholders, the creditors, and their attorneys; the second awarded compensation to would-be travellers on Laker; and the third lawsuit (unsuccessfully) sought damages for travel agents. All the lawsuits assumed high profits by Laker in spite of its low fares, and complex apportionment of the (assumed) revenues would have to take place in the event the instant action were permitted to proceed. It is to be noted, too, that these plaintiffs, as Laker employees, were also creditors and entitled to share in the proceeds of the settlement of the first Laker action.

Third. As stated above, the principal lawsuit arising out of the collapse of Laker Airways (Laker I) was settled, and so was the action on behalf of the transatlantic travellers (Laker II). Indeed, settlement without trial is common in major antitrust actions, and it is particularly to be preferred where, as here, difficult and delicate problems arising from conflicting national laws and policies are involved, calling in the end for direct confrontations between governments and courts.<sup>9</sup> Yet defendants in such lawsuits are unlikely to enter into settlements if each such settlement can immediately be followed by a new treble damage lawsuit based on the same allegations as the first, the only real distinction being that some new group of alleged victims is bringing the action.<sup>10</sup>

For the reasons stated, defendants' motion will be granted<sup>11</sup> and the action will be dismissed.

/s/ Harold H. Greene  
HAROLD H. GREENE  
United States District Judge

June 30, 1986

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<sup>9</sup> See *Laker Airways v. Pan American World Airways*, 604 F. Supp. 280 (D.D.C. 1984); *Laker Airways v. Pan American World Airways*, 596 F. Supp. 202 (D.D.C. 1984); *Laker Airways v. Pan American World Airways*, 577 F. Supp. 348 (D.D.C. 1983); *Laker Airways v. Pan American World Airways*, 559 F. Supp. 1124 (D.D.C. 1983).

<sup>10</sup> None of these obstacles is overcome by plaintiffs' allegations in the complaint that defendants intended to injure them. See *Associated General Contractors v. Carpenters*, *supra*, 459 U.S. at 537.

<sup>11</sup> However the Court denies defendant UTA's request for sanctions.

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**Civil Action No. 86-0304**

**DAVID WEAVER ADAMS, et al.,  
*Plaintiffs,*  
v.**

**PAN AMERICAN WORLD AIRWAYS, INC., et al.,  
*Defendants.***

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**Civil Action No. 86-0629**

**JOHN ERIC CLIFTON, et al.,  
*Plaintiffs,*  
v.**

**PAN AMERICAN WORLD AIRWAYS, INC., et al.,  
*Defendants.***

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[Filed June 30, 1986]

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**ORDER**

For the reasons given in a Memorandum issued contemporaneously herewith, it is this 30th day of June, 1986

ORDERED that defendants' motions to dismiss be and they are hereby granted; and it is further

ORDERED that defendant UTA's request for sanctions be and it is hereby denied; and it is further

**25a**

**ORDERED that the complaints in the above-titled actions be and they are hereby dismissed.**

**/s/ Harold H. Greene  
HAROLD H. GREENE  
United States District Judge**

**APPENDIX C**

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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No. 86-5468

DAVID WEAVER ADAMS, *et al.*,  
*Appellants,*  
v.

PAN AMERICAN WORLD AIRWAYS, INC.,  
a domestic corporation, *et al.*

And Consolidated Cases 86-5469,  
86-5538 and 86-5540

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[Filed Sept. 1, 1987]

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Appeal From the United States District Court  
for the District of Columbia

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Before: RUTH B. GINSBURG and WILLIAMS, *Circuit Judges*; MORGAN, *Senior Circuit Judge*

**JUDGMENT**

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. Upon consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

*Per Curiam*

FOR THE COURT:

/s/ George A. Fisher  
GEORGE A. FISHER  
Clerk

Date: September 1, 1987

Opinion for the Court filed by Circuit Judge Williams.

**APPENDIX D**

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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No. 86-5468

DAVID WEAVER ADAMS, *et al.*

v.

PAN AMERICAN WORLD AIRWAYS, INC.,  
a domestic corporation, *et al.*

And Consolidated Cases

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[Filed Oct. 23, 1987]

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Before: RUTH B. GINSBURG and WILLIAMS, *Circuit Judges*; McGOWAN, *Senior Circuit Judge*

**ORDER**

Upon consideration of appellants' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

*Per Curiam*

FOR THE COURT:

GEORGE A. FISHER  
Clerk

By: /s/ Robert A. Bonner  
ROBERT A. BONNER  
Deputy Clerk

**APPENDIX E**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH DISTRICT**

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No. 86-6003

D.C. No. CV-86-119-CBM

BRIAN CLEWER, INC.,  
*Plaintiff-Appellant,*  
v.

PAN AMERICAN WORLD AIRWAYS, *et al.*,  
*Defendants-Appellees,*

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[Filed Feb. 12, 1987]

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Appeal from the United States District Court  
for the Central District of California

Hon. Consuelo B. Marshall, District Judge, Presiding

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Argued and Submitted February 6, 1987—Pasadena, CA

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**MEMORANDUM\***

Before: KENNEDY, SKOPIL and KOZINSKI, *Circuit Judges.*

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 21.

Clewer challenges the district court's dismissal of his action for lack of standing under § 4 of the Clayton Act. Because a determination of standing is a question of law, we review the district court's decision *de novo*. *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 449 (9th Cir.), cert. denied, 105 S. Ct. 3481 (1985).

In *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538-45 (1983), the Supreme Court enumerated the factors to be evaluated in determining whether a plaintiff has standing to bring an antitrust action. We summarized these factors in *Bubar*:

- “(1) the nature of the plaintiff's alleged injury—whether it was the type the antitrust laws were intended to forestall,
- (2) the directness of the injury,
- (3) the speculative measure of the harm,
- (4) the risk of duplicative recovery, and
- (5) the complexity in apportioning damages.

752 F.2d at 449. See *Los Angeles Memorial Coliseum Com'n v. NFL*, 791 F.2d 1356, 1363 (9th Cir. 1986). We are persuaded that the balance of these factors weigh against affording Clewer standing in this case.

Clewer is neither a consumer nor a competitor in the market in which trade is alleged to have been restrained. Therefore, his alleged injury is not of the type that the antitrust laws were meant to prevent. See *Associated General Contractors*, 459 U.S. at 538-39. Clewer alleges that it competes with appellees in the marketing of air transportation in the Southern California area. This market does not involve the production of airline service between the United States and the United Kingdom, but rather is limited to the distribution of airline tickets in Southern California. Clewer's complaint does not allege that “output has been curtailed or prices enhanced

throughout [the] entire [relevant] market." *Id.* at 539 n.40. Rather, Clewer's allegations concern conduct in the air transportation market in which appellants and Laker competed, but in which Clewer concededly was neither a consumer nor a competitor.

Clewer's alleged injury is also indirect; it is derivative of whatever harm may have been suffered by Laker. In evaluating the directness of injury for standing purposes, the Supreme Court noted in *Associated General Contractors*:

The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general.

*Id.* at 542. As in *Associated General Contractors*, "[d]enying [Clewer] a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied." *Id.* Three other actions have been brought in connection with the alleged conspiracy of appellant airlines to put Laker out of business: by Laker, by Laker's former passengers and by Laker's former employees. We agree with the district court that the plaintiffs in these actions are all in a better position to assert harm than Clewer and to vindicate the public interest in remedying antitrust violations.

We also agree with the district court that the other policy factors discussed in *Associated General Contractors* and *Bubar*—speculative measure of harm, risk of duplicative recovery, and complexity in apportioning damages—militate against a finding that Clewer has standing.

AFFIRMED.

**APPENDIX F**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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Civil Action No. 86-0629

**JOHN ERIC CLIFTON, et al.,**

*Plaintiffs,*

v.

**PAN AMERICAN WORLD AIRWAYS, INC., et al.,**

*Defendants.*

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**AMENDED COMPLAINT**

(ANTITRUST VIOLATION, 15 U.S.C. §§ 1 and 2)

The above-named plaintiffs, acting through their attorneys, bring this civil action against the defendants named above and complain and allege as follows:

**JURISDICTION AND VENUE**

1. This Complaint is filed and this action is instituted under sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) to secure damages and injunctive relief for defendants' violations, as alleged in this Complaint, of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), and for other relief, as set forth below. Jurisdiction is conferred upon this Court by 15 U.S.C. §§ 15 and 26, and by 28 U.S.C. § 1337. Venue is properly laid in this district pursuant to sections 4 and 12 of the Clayton Act (15 U.S.C. §§ 15 and 22) and 28 U.S.C. § 1391.

2. Each of the defendants transacts and does business, can be found or has an agent within the District of

Columbia and is otherwise amenable to the personal jurisdiction of this Court.

3. Plaintiff John Eric Clifton was a Spare Parts Procurement Buyer for Laker's aircraft with nine years seniority. As a direct result of defendants' violation of the antitrust laws, plaintiff Clifton lost a promising and well-established career with Laker and has lost a high and increasing salary. He has suffered hardship, disruption and expense. Plaintiff Clifton was employed by Laker Airways until April 16, 1982.

4. Plaintiff Gregory Brian Dix was General Manager, Eastern Region USA and had overall responsibility for all aspects of Laker's activities in the USA. He had nine years seniority. As a direct result of defendants' violation of the antitrust laws, plaintiff Dix lost a promising and well-established career as a senior executive in the airline industry. He has lost a high and increasing salary and valuable pension and other benefits. He has been unable to find comparable employment. He has suffered hardship, disruption and expense. Plaintiff Dix was employed by Laker Airways until March 31, 1982.

5. Plaintiff Linda A. Earls was Laker's New York-JFK Station Manager will full responsibility for Laker's operation at the JFK Airport. She had nine years seniority. As a direct result of defendants' violation of the antitrust laws, plaintiff Earls lost a promising and well-established career as a senior manager in the airline industry. She lost a high and increasing salary and other valuable benefits. She has been unable to find comparable employment. She has suffered hardship, disruption and expense. Plaintiff Earls was employed by Laker Airways until March 10, 1982.

6. Plaintiff Michael John Flake was a Senior Supervisor responsible for all aircraft cleaning at Laker with fifteen years seniority. As a direct result of defendants' violation of the antitrust laws, plaintiff Flake lost a

promising and well-established career with Laker and has lost a high and increasing salary and valuable pension and other benefits. He has suffered hardship, disruption and expense. Plaintiff Flake was employed by Laker Airways until April 12, 1982.

#### PARTIES DEFENDANT

7. Defendant Pan American World Airways, Inc. ("Pan Am") is a New York corporation with its headquarters in New York, New York. Pan Am provides scheduled and charter air transportation between various states in the United States and between the United States and the United Kingdom and other countries. Pan Am transacts and does business within the District of Columbia at 1000 16th Street, N.W., Washington, D.C. 20036.

8. Defendant Trans World Airlines, Inc. ("TWA") is a Delaware corporation with its corporate headquarters in New York, New York. TWA provides scheduled and charter air transportation between the United States and the United Kingdom and other countries. TWA transacts and does business with the District of Columbia at 1825 Eye Street, N.W., Washington, D.C. 20006.

9. Defendant British Airways Plc ("British Airways") is a foreign corporation with its headquarters in Hounslow, Middlesex, England. British Airways provides scheduled and charter air transportation between the United Kingdom and the United States, including Washington, D.C. British Airways transacts and does business with the District of Columbia at 1850 K Street, N.W., Washington, D.C. 20006.

10. Defendant Lufthansa German Airlines (Deutsche Lufthansa Aktiengesellschaft) ("Lufthansa") is a foreign corporation with its headquarters in Cologne, Federal Republic of Germany. Lufthansa provides scheduled and charter air transportation between the Federal Republic of Germany and several points in the United States.

Lufthansa transacts and does business with the District of Columbia at 1101 Sixteenth Street, N.W., Washington, D.C. 20036.

11. Defendant Swissair, Swiss Air Transport Company Limited ("Swissair") is a foreign corporation with its headquarters in Zurich, Switzerland. Swissair provides scheduled and charter air transportation between Switzerland several points in the United States. Swissair transacts and does business with the District of Columbia at 1717 K Street, N.W., Washington, D.C. 20006.

12. Defendant British Caledonian Airways Limited ("British Caledonian") is a foreign corporation with its headquarters in Crawley, West Surrey, England. British Caledonian provides scheduled and charter air transportation between the United Kingdom several points in the United States. British Caledonian transacts and does business with the District of Columbia through various agents. Its registered agent for service of process is Leonard Bechick, Suite 700, 1220 19th Street, N.W., Washington, D.C. 20036.

13. Defendant McDonnell Douglas Corporation ("MDC") is a Maryland corporation with its headquarters in St. Louis, Missouri. MDC is a manufacturer of aircraft and aerospace equipment and sells its products in interstate and foreign commerce. MDC transacts and does business within the District of Columbia.

14. Defendant McDonnell Douglas Finance Corporation ("MDFC") is a Delaware corporation with its headquarters in Long Beach, California. MDFC is a wholly-owned subsidiary of MDC and finances sales of aircraft and other equipment sold in interstate and foreign commerce by MDC. MDFC transacts and does business within the District of Columbia.

15. Defendant Sabena, Belgian World Airlines ("Sabena") is a foreign corporation with its headquarters in Brussels, Belgium. Sabena provides scheduled and

charter air transportation between Belgium and several points in the United States. Sabena transacts and does business within the District of Columbia at 1725 K Street, N.W., Washington, D.C. 20006.

16. Defendant KLM, Royal Dutch Airlines ("KLM") is a foreign corporation with its headquarters at Schipol Airport, the Netherlands. KLM provides scheduled and charter air transportation between the Netherlands and several points in the United States. KLM transacts and does business within the District of Columbia at 1730 K Street, N.W., Washington, D.C. 20009.

17. Defendant Union de Transports Aeriens ("UTA") is a foreign corporation with its headquarters in Puteaux, France. UTA provides scheduled transportation to and between various points in Europe, Africa, the Middle East, the Far East, Australasia and the United States. UTA transacts and does business within the District of Columbia at 1120 Connecticut Avenue, N.W., Washington, D.C. 20036.

18. Defendant Scandinavian Airlines System ("SAS") is a foreign corporation with its headquarters in Stockholm, Sweden. SAS provides scheduled air transportation between Denmark, Norway and Sweden, and several points in the United States. SAS transacts and does business within the District of Columbia at 1725 K Street, N.W., Washington, D.C. 20006.

19. Defendant Linee Aeree Italiane, SpA. ("Alitalia") is a foreign corporation with its headquarters in Rome, Italy. Alitalia provides scheduled air transportation between Italy and several points in the United States. Alitalia transacts and does business within the District of Columbia at 1001 Connecticut Ave., N.W., Washington, D.C. 20036.

20. Defendant Lineas Aereas de Espana, S.A. ("Iberia") is a foreign corporation with its headquarters in Madrid, Spain. Iberia provides scheduled air trans-

portation between Spain and several points in the United States. Iberia transacts and does business within the District of Columbia at 1725 K Street, N.W., Washington, D.C. 20006.

21. Defendants Pan Am, TWA, British Airways, Lufthansa, Swissair, British Caledonian, KLM, SAS, Sabena, UTA, Alitalia and Iberia will be referred to as the "airline defendants." Defendants MDC and MDFC will be referred to below as the "lender defendants."

#### TRADE AND COMMERCE

22. Since 1946, the fares for scheduled air transportation on North Atlantic airline routes have been set, with very few exceptions, by government approved agreements among the airline members of the International Air Transport Association (IATA). IATA agreements set fares at a higher level than would prevail in a competitive market.

23. Prior to 1978 and subsequent to February 17, 1982, the airline defendants, except UTA, between and among them virtually had total control over the market for employment in the airline industry serving the North Atlantic.

24. Laker Airways Limited was founded in 1966, and rapidly grew into a major operator of charter air transportation. Laker began charter flight operations between the United Kingdom and North America in 1970 and continued as a North Atlantic charter operator until February 5, 1982. Despite the success of Laker's charter business, Laker recognized in 1971 that the types of international airline service then in existence did not meet the needs of passengers who were not willing or able to plan far in advance and conform to the many restrictions on charter air transportation, or who could not afford or were not willing to pay the high prices charged by the IATA airlines.

25. Laker proposed a novel "Skytrain" service which was designed to provide a new type of low-cost air trans-

portation that would meet the needs of these passengers on simple terms at the lowest possible price. A Skytrain service passenger would arrive at the airport on the day chosen for travel and purchase a ticket there on a first-come, first-served basis. Passengers could bring their own food or purchase meal service at an additional price from Laker. If a passenger wished to travel beyond Laker's routes, he could buy another ticket separately from another airline or a travel agent.

26. Commencing on June 15, 1971, Laker sought authority from the British government and then the U.S. government to operate Skytrain service between New York and London. The airline defendants, except UTA, resisted Laker's efforts to the limits of their ability in the United States and the United Kingdom. The resistance of the airline defendants, except UTA, delayed implementation of Laker's Skytrain service until 1977.

27. Before the advent of Laker's Skytrain service, the IATA-fixed economy fare from New York to London was \$313 for a one-way ticket. Laker offered New York-London service for \$115. The IATA members, including the airline defendants, saw Laker's Skytrain service as a threat to the entire IATA system of maintaining high prices by airline agreement. The airline defendants, except UTA, agreed to a predatory scheme to destroy transatlantic charters and Laker's scheduled Skytrain service by, among other things, offering high-cost service at prices below the costs of those services. The IATA members agreed which of them would offer below-cost services on the New York-London route. The airline defendants, except UTA, expected to experience short-term financial losses in carrying out this scheme, but intended to recoup these losses by raising prices after they had eliminated the competition of charter services and Laker's scheduled Skytrain service.

28. When their concerted predatory action failed to destroy or deter Laker, the airline defendants expanded

the scope of their predatory scheme as described below. Laker, in large part due to the highly competent and highly motivated Laker employees who worked long hours for, in many cases, less pay than their counterparts who worked for the airline defendants, nevertheless survived, expanded its scheduled operations, and showed profits until 1981, although its profits were lower than they would have been in a market free of predatory activity.

29. Despite the joint efforts by its competitors, Laker increased the number of routes on which it offered scheduled airline service between the United States and the United Kingdom. Even while Laker was applying for government permission to provide scheduled service between Los Angeles and London, Pan Am, TWA and British Airways instituted below-cost fares on that route, seeking to prevent Laker's entry. After Laker began providing Los Angeles-London Skytrain service in 1978, Pan Am, TWA and British Airways coordinated their fares, services and schedules so as to take as many passengers from Laker as possible. When Laker provided Skytrain service between Miami and London, Pan Am and British Airways agreed to offer below-cost services on that route. Pan Am, TWA and British Airways acted in concert to target their below-cost services on Laker's routes.

30. By 1981, Laker was operating nine scheduled non-stop U.S.-U.K. routes: New York-London, New York-Manchester, Los Angeles-London, Los Angeles-Manchester, Los Angeles-Prestwick (Scotland), Miami-London, Miami-Manchester, Miami-Prestwick, and Tampa-London. In 1981, Laker carried one out of every seven air passengers between the United States and the United Kingdom, and Laker's total North Atlantic passenger traffic ranked sixth out of the 43 airlines operating scheduled air services between North America and Europe.

31. Many passengers going to or from continental European countries such as Germany and Switzerland arranged to travel via London in order to use Laker's

Skytrain service across the Atlantic. European IATA members, including defendants Lufthansa, Swissair, KLM, Sabena, SAS, Alitalia and Iberia, found that Laker was attracting many passengers traveling between continental Europe and the United States, thereby competing with those airlines and putting downward pressure on their fares.

32. In addition to its North Atlantic routes, by 1981 Laker held licenses from the U.K. government for a transpacific route from Los Angeles and San Francisco to Hong Kong via Honolulu and Tokyo; a London-Hong Kong route via Sharjah, United Arab Emirates; and European routes between London and Berlin and between London and Zurich. Laker was actively pursuing authority from the other governments involved and planning the commencement of worldwide low-fare service. Laker also had instituted legal proceedings to declare unlawful under the Treaty of Rome the denial of Laker's application to provide low-fare Skytrain services throughout Europe. Laker's successful low-fare operations and its efforts to expand the scope and availability of those operations were a unique competitive threat to the airline defendants.

33. In 1981, the precipitous drop in the U.S. dollar value of the pound sterling affected Laker's ability to pay its dollar debts. Already weakened by the airline defendants' concerted predatory attacks, Laker realized in May of 1981 that it might be unable to meet its aircraft loan repayment requirements in January 1982 and explained the situation to its lenders. Laker made clear that it was prepared, if necessary, to terminate its business in an orderly manner so that no passengers would be inconvenienced, but sought refinancing of its obligations in order to continue in business.

34. At approximately the same time as Laker's financial problems became publicly known in the summer of 1981, Pan Am raised approximately \$800 million from

the sale of assets. Without these large sales of assets, the company would have been in default of its own loan agreements. Although these extraordinary sales of assets temporarily provided Pan Am with a large amount of cash, it continued to suffer massive losses on its airline operations.

35. British Airways also suffered massive losses in 1980 and 1981, which were financed by the British government. British Airways' auditors said later, in October 1982, that the company could be considered a "going concern" only because the British government guaranteed \$1.7 billion of its debt. British Airways also sold significant assets to raise cash in 1980 and 1981. TWA was also losing large sums on its U.S.-U.K. operations in 1981. All the airline defendants stated in public that they needed to increase their fares, particularly their lowest fares.

36. The airline defendants, except UTA, realized that Laker's financial condition presented them with an opportunity finally to eliminate Laker's price competition and to recoup their losses by raising their fares in 1982 through an IATA agreement. In the fall of 1981, Pan Am, TWA and British Airways threatened to drop the prices for their higher-cost, more attractive services to the same level as Laker's Skytrain service fares, thereby causing Laker enormous losses, unless Laker abandoned its policy of price competition. Laker refused, and insisted that its less valuable services required lower fares in order for Laker to compete. In October 1981, Pan Am, TWA and British Airways agreed to and did carry out their threat to offer their more attractive, higher-cost services at Laker's prices on all of Laker's routes served by those defendants.

37. As part of their predatory scheme, Pan Am, TWA and British Airways agreed to pay extraordinarily high secret commissions to travel agents, at great loss, to divert potential Laker passengers. These defendants also

pressured large Laker clients to switch their business from Laker, and spread false rumors that Laker was going bankrupt.

38. The aforesaid predatory conduct was successful and prevented Laker from offering the public a price differential. To the detriment of Laker and the public, Laker was forced to charge the prices that its IATA competitors agreed among themselves to charge.

39. In the meantime, Laker had reached an agreement with its lenders for financial support which assured Laker's survival notwithstanding the losses Laker suffered due to the predatory conduct of its IATA competitors. By Christmas Eve, 1981, Laker was advised that all of the lenders had agreed to provide the necessary finance. The lender defendants authorized a public announcement to this effect and authorized Laker to state publicly that Laker's long-term financial future had been assured.

40. When they learned of the financing agreement and upon the instigation and encouragement of defendants British Caldeonian and UTA, defendants Lufthansa, Swissair, KLM, Sabena, SAS, Alitalia and Iberia, knowing of the predatory scheme described above, joined in efforts to pressure Laker's lenders to further the objectives of the scheme by denying Laker the necessary finance and forcing Laker out of business.

41. UTA took a leading role in initiating this pressure by sending an urgent telex to the Chief Executives of KLM, SAS, Swissair, Lufthansa, Alitalia, British Caledonian, Sabena and Iberia stating as follows:

I would like to draw your personal attention on the situation presently developing between Laker and MDC/General Electric by which the two manufacturers would invest 9.4 millions USD and have a 10 to 20 percent holding in this carrier. It is totally unacceptable (sic) to see two of our main

suppliers utilising funds generated by their main clients to provide direct assistance to the one who very openly and knowingly generated the disastrous crisis which we are in. I suggest we make known to the presidents of McDonnell Douglas and General Electric our opposition to such a move. Could you advise your comments.

42. UTA received responsive telexes from the airline defendants listed in the preceeding paragraph and on February 2, 1982, Rene Lapautre, the President and General Manager of UTA, sent a telex to Sanford McDonnell, Chairman of MDC and to Brian Rowe of General Electric with copies to the Chief Executives of the airline defendants KLM, SAS, Swissair, Lufthansa, Alitalia, British Caledonian, Sabena and Iberia which read:

I am addressing you as a long-standing client of your company with which UTA has done business valued millions of dollars. I am extremely upset by the information about the intended commitment of your company in Laker Airways.

This is a fundamental departing (sic) from the established neutral position of every manufacturer which cannot be accepted. Furthermore it is ironical that you would provide direct support to the one who openly and knowingly generated the disastrous crisis which we are in. It would be outrageous to the whole air transport industry and particularly to your clients who are providing funds to your company.

Such a decision from your part would undoubtedly bear consequences on our future relationship and I do hope you will avoid entering such undesirable situation.

Best regards  
R. Lapautre/Chairman

43. As late as February 3, 1982, the lender defendants and other co-conspirators including the Midland

Bank Plc., the Clydesdale Bank, Samuel Montagu and Thomas McLintock, continued to mislead Laker into believing that the financing was being provided as agreed, even though the lender defendants had joined with the airline defendants to withhold such financing and thereby destroy Laker.

44. Laker relied on the lender defendants' misrepresentations that this financing was assured and therefore did not seek other sources of finance which were available to it. On February 4-5, 1982, the lender defendants, without warning, forced Laker to authorize the Clydesdale Bank to call in a receiver, William Mackey, from Ernst & Whinney, who immediately and in furtherance of the conspiracy, dismantled Laker Airways and fired the employees of the Laker companies.

#### VIOLATION OF ANTITRUST LAWS

##### *Combination and Conspiracy In Restraint of Trade and To Monopolize*

45. Plaintiff repeats and realleges paragraphs 1 through 41 of this complaint.

46. Beginning at a time presently unknown to plaintiffs, but at least as early as 1974 and continuing thereafter at least until February 17, 1982, defendants and co-conspirators have engaged in an unlawful combination and conspiracy unreasonably to restrain and to monopolize United States foreign trade and commerce in air transportation between the United States and the United Kingdom and other European countries in violation of Sections 1 and 2 of the Sherman act, 15 U.S.C. §§ 1 and 2.

47. The unlawful conduct of the defendants and their co-conspirators had direct, substantial and foreseeable effects on United States foreign trade and commerce, and on trade and commerce which is not trade or com-

merce with foreign nations, on import trade or import commerce with foreign nations, and on export trade and export commerce with foreign nations of persons engaged in such trade or commerce in the United States.

48. Pursuant to this unlawful combination and conspiracy each defendant has taken a number of actions, including the actions set forth in this Complaint, with the intent to further the purpose and objective of the combination and conspiracy, which was to eliminate Laker as an independent competitive force in trade and commerce between the United States and foreign nations.

49. Pursuant to this unlawful combination and conspiracy, the defendants intended to destroy the work force of the Laker Group of Companies. It was the highly motivated, industrious Laker work force that enabled Laker to provide the large scale, low fare, low cost competition which the defendants found unacceptable.

50. Each of the plaintiffs suffered financial injury as a direct result of the actions of the defendants. The defendants knew or had reason to know that their unlawful conduct would injure each of the plaintiffs' business and property. The defendants intended to cause injury to each of the plaintiffs.

51. The airline defendants, except UTA, control the labor market for airline employment in air transportation between and among the U.S., U.K. and Europe. The defendants knew or had reason to know that the plaintiffs would be unable to find comparable employment after they lost their employment with Laker. Each of the plaintiffs suffered irreparable injury.

52. Each of the plaintiffs suffered injuries that are the type of injuries that the antitrust laws were intended to forestall. The defendants' conduct resulted in a substantial diminution in the market for airline employment.

PRAYER FOR RELIEF

53. Because of defendants' unlawful conduct as alleged in this Complaint, plaintiffs demand judgment and pray:

- a. For judgment against the defendants, jointly and severally, for the injury to each of the plaintiffs' business and property, in such amounts as shall be determined after trial, to be trebled as provided by law;
- b. For an injunction requiring the defendants to employ each of the plaintiffs in a position with a salary, pension and other benefits equivalent to that which each of the plaintiffs would have had but for the defendants' violations of law;
- c. For interest, costs, and attorneys' fees as provided by law; and
- d. For such other and further relief as the Court decides is just and proper.

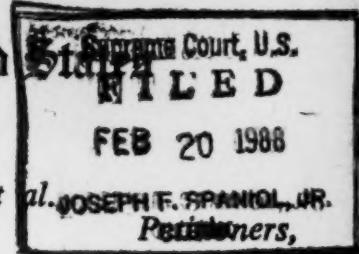
54. Plaintiff demands a jury trial.

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Dated: April 28, 1986



IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1987



v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.,  
*Respondents.*

JOHN ERIC CLIFTON, et al.,

*Petitioners,*

v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.,  
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**RESPONDENTS' BRIEF IN OPPOSITION TO PETITION**

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### **Question Presented**

Whether the Court of Appeals and the District Court considered the correct factors in concluding that former employees of Laker Airways Limited, a liquidated airline, lack antitrust standing to seek treble damages for injuries purportedly sustained as a result of an alleged conspiracy to drive their employer out of business?

### **Statement Pursuant to Rule 28.1**

The parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondents are as follows:

#### **British Airways Plc**

Airline Tariff Publishing Company; Air Mauritius Ltd; The Airplus Company Ltd.; Atlas Holidays Ltd.; Beau Vallon Properties Ltd.; Belfast Europa Ltd.; British Caledonian Airways Ltd.; Brussels Europa Societe Anonyme; Eupo-Air Holdings Ltd.; Eupo-Air Travel Services Ltd.; GB Airways Ltd.; Holts Paris Welcome Service S.A.; IAL Caribbean Ltd.; Isotal (Imobiliaria Do Sotavento Do Algarve); Karsy Walk Inn Ltd.; Kenya Safari Lodges & Hotels Ltd.; Los Angeles Technical Services Corp.; Mosside Enterprises Ltd.; Penta Hotels N.V.; The Plimsoll Line Ltd.; San Francisco Foreign Flag Carrier Corp.; Sun Resorts Ltd.; Tourism Promotion Services (Kenya) Ltd.; Tourism Promotion Services (Uganda) Ltd.; Travel Automation Services Ltd.

#### **British Caledonian Airways Limited**

British Airways Plc; British Caledonian Flight Training Ltd.; British Caledonian Group Plc; Cal Air International Ltd.; Caledonian Air Leasing Ltd.; Impact Publishing International Ltd.

#### **Deutsche Luftansa Aktiengesellschaft**

Deutsche Hotelgesellschaft für Entwicklungsländer (OHG) mbH; Lufthansa-Intercontinental-Hotel Verwaltungsgesellschaft, mbH; Düsseldorf Intercontinental Hotels GmbH; Frankfurt Intercontinental Hotels GmbH; Köln Intercontinental Hotels GmbH; Köln Intercontinental Hotels GmbH & Co. KG; Ham-

burger Hotel-Verwaltungsgesellschaft mbH; KG Ham-  
burger Hotel-Verwaltungsgesellschaft mbH & Co.;  
Hotel Vier Jahreszeiten GmbH; Penta Hotels N.V.;  
European Hotel Corporation (EHC) München GmbH  
& Co.; Penta Hotels (France) S.A.; Tourism Promotion  
Services (Kenya) Ltd.; Tourism Promotion Services  
(Uganda) Ltd.; First GmbH; First GmbH & Co.  
KG; Wiesbadener Gründstücksgesellschaft mbH; Deut-  
sches Reisebüro GmbH; Luftfracht-System GmbH;  
DUS-Jumbo-Finanz-Gesellschaft für Flugzeugverchart-  
erung, mbH; HAM-Jumbo-Flug/ Gesellschaft für Flug-  
zeugvercharterung, mbH; CGN-Jumbo-Flug/Gesell-  
schaft für Flugzeugvercharterung, mbH; MDG,  
START Datentechnik für Reise und Touristik GmbH;  
Hansa Luftbild GmbH; Changi International Airport  
Services Pte. Ltd.; DLT Deutsche Luftverksgesellschaft  
mbH; Societe Internationals de Telecommunications  
Aeronautiques (SITA); United Americas Insurance  
Corporation; Lufthansa Informationstechnik und Soft-  
ware GmbH; MVP Versuchs- und Planungsgesellschaft  
für Magnetbahnsysteme GmbH; Anchorage Fueling  
and Service Company; San Francisco Foreign Flag  
Carriers Corp; Los Angeles West Terminal Fuel Cor-  
poration; Los Angeles Technical Equipment Cor-  
poration; Nigerian Aviation Handling Company;  
BAVARIA-LLOYD Reisebüro GmbH.

#### KLM Royal Dutch Airlines

Air U.K.; AMACO BV; Amsterdam Airport Drug-  
store BV; Barbizon New York Limited Partnership;  
Biemans Industries BV; CIAS; Computer Uitwijk  
Centrum BV; CSH-BHP Limited Partnership; Delta  
Air Transport NV; Deutech International BV; Holland  
Organizing Centre BV; Horeca Exploitatie Mij Schip-

hol; Hotel Maatschappij Oud Amsterdam BV; Hotel Mij Leiden BV; Hotel Mij Schiphol BV; Intercal BV; Martinair; Midway House Ltd; NV Hotel Torarica; Paques BV; Polygon Insurance Co. Ltd; Schreiner Luchtvaart Groep BV; Sentraca S.A.\*

Lineas Aereas De Espana, S.A.

Instituto Nacional de Industrias (I.N.I.); Aviacion y Comercio (AVIACO).

McDonnell Douglas Corporation

McDonnell Douglas Finance Corporation.

McDonnell Douglas Finance Corporation

McDonnell Douglas Corporation.

Pan American World Airways, Inc.

Aeronautical Radio, Inc.; Air Cargo, Inc.; Airline Tariff Publishing Company; Escola Americana de Rio de Janeiro; Honolulu Fueling Facilities Corporation; International Aeradio (Caribbean) Ltd.; Liberian Development Corporation; Manhattan Air Terminal, Inc.; Nigerian Aviation Handling Co.; Pan Am Corporation; Promotora de Hoteles de Turismo Medillin, S.A.; Radio Aeronautica Paraguaya, S.A.; Social Inmobiliaria Norteamericana, S.A.; Societe de Tourisme et Representation; Societe International de Telecommunications Aeronautiques.

Sabena, Belgian World Airlines

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\* Barbizon New York Limited Partnership ("BNYLP") is a general partner, and CSH-BHP Limited Partnership ("CSH-BHP") is a limited partner, together with Golden Tulip Barbizon, Inc., ("GTBI"), in the Barbizon Hotel Partnership, a New York limited partnership. GTBI is a wholly-owned indirect subsidiary of KLM Royal Dutch Airlines. Limited Partnership interests in BNYLP and CSH-BHP are held by the public.

## Scandinavian Airlines System

Det Danske Luftfartselskab A/S, Denmark; Det Norske Luftfartselskap A/S, Norway; AB Aerotransport, Sweden; Scandinavian Multi Access Systems, AB, Stockholm; A/S Dansk Rejsebureau, Copenhagen; Danair A/S, Copenhagen; Linjeflyg AB, Stockholm; Polygon Insurance Co. Ltd.; Guernsey; Travel Management Group, Sweden AB, Stockholm; Bennett Reisebureau A/S, Oslo; Wideroe's Flyveselskap A/S, Oslo; Greenlandair Inc.; Godthab; Scanator AB, Stockholm; Helikopter Service A/S, Oslo; Københavns Lufthavns Forretningscenter K/S, Copenhagen; Arctic Hotel Corp. A/S Narssarssuaq; AB Resdab, Stockholm; Dar-es-Salaam Airport Handling Co. Ltd, Dar-es-Salaam; Copenhagen Excursions A/S, Copenhagen; Malmo Flygfraktterminal AB, Malmo.

## Swissair, Swiss Air Transport Company Limited

Balair Ltd.; CTA Compagnie de Transport Aerien; Airest Restaurant-und Hotelbetriebsgesellschaft mbH; Albergo Brocco e Posta SA; Am Stadtpark Unternehmensbeteiligungsgesellschaft mbH; Avireal Ltd.; Bowers Company Inc.; Buenos Aires Catering SA; Cresta Ferien AG; Flughafen-Immobilien-Gesellschaft (FIG); Heliswiss Swiss Helicopter Ltd.; Hiro-Swissair Immobilienverwertungsgesellschaft mbH; Hoch-Ybig AG; Hotel Atlantis Ltd.; Hotel International Ltd.; Jack Maeder Aircargo Ltd.; Penta Hotels N.V.; Penta Hotels (France) S.A.; Penta Hotels (Switzerland); Polygon Insurance Company Ltd.; St. Peter Port; Popularis Tours; Prohotel Ltd.; Prohotel Laundry Ltd.; Kuoni Travel Ltd.; S.A. des Hotels President; San Bernardino SA Impianti Turistici; Swiss Egyptian Restaurant Corporation (SERCO); Uto-Ring AG;

Hiro-Swissair; Heliswiss; Palace Grand Hotel und Bernerhof AG; Swiss Center Inc. (New York); Swiss Center Ltd. (London); Brienz-Hothorn-Unternehmung AG; Schweiz. Gesellschaft Fuer Hotelkredit SGH; Set/Societe D Expansion Touristique S.A.; Belatour S.A.R.L. Mulhouse; Zuercher Freilager AG.

Trans World Airlines, Inc.

Aero Limited Partnership.

Union de Transports Aeriens

Linee Aeree Italiane, S.p.A. has no parent, subsidiary or affiliate whose securities are publicly owned.

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IN THE  
**Supreme Court of the United States**  
October Term, 1987  
No. 87-1218

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DAVID WEAVER ADAMS, *et al.*,  
*Petitioners*,  
v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,  
*Respondents*.

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JOHN ERIC CLIFTON, *et al.*,  
*Petitioners*,  
v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,  
*Respondents*.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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**RESPONDENTS' BRIEF  
IN OPPOSITION TO PETITION**

Using the analysis mandated by the Court in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), both the District Court and a unanimous panel of the District of Columbia Circuit concluded that petitioners, employees of a defunct airline, lack antitrust standing to sue for treble damages alleged to

have resulted from a conspiracy to drive their employer out of business. That result was dictated by appropriate consideration of the circumscribing and guiding factors identified in *Associated General Contractors*.

Petitioners argue that this case "presents a perfect factual situation for resolving the conflict among the circuits on the antitrust standing of participants in a restrained market who are neither competitors of the defendants nor consumers." Petition at 6-7. Not only is there no such conflict, but the Court of Appeals firmly based its decision on those factors in *Associated General Contractors* that are entirely independent of whether petitioners were consumers or competitors in the relevant market.

This case was decided below on the routine application of *Associated General Contractors* and presents no novel or significant issue for the Court to decide. The petition should be denied.

### **Statement of the Case**

This action is the fourth in a series of antitrust suits growing out of the failure of Laker Airways Limited ("Laker") in February 1982. Each suit has been predicated on the same alleged conspiracy to eliminate Laker as a competitor in air transportation between the United States and the United Kingdom. Only a few months ago, this Court denied certiorari in the third of these suits. This fourth suit—particularly when considered in light of the three previous *Laker* litigations—is an example of why Congress did not intend to allow every person tangentially affected by an alleged antitrust violation to maintain an action to recover treble damages. *Blue Shield v. McCready*, 457 U.S. 465, 477 (1982).

The first suit was brought by Laker itself in the United States District Court for the District of Columbia against ten airlines, an aircraft manufacturer, and its financing subsidiary.\* That suit was settled on October 1, 1985. *See Adams v. Pan Am. World Airways, Inc.*, 640 F. Supp. 683, 684 (D.D.C. 1986).

The second litigation, consisting of a number of consolidated class actions, was brought by passengers who claimed that, as a result of the alleged conspiracy, they were forced to pay higher fares for U.S./U.K. air transportation than they would have paid if Laker had remained in the market ("Laker II").\*\* Judge Harold H. Greene approved the settlement of these passenger claims on March 18, 1986. *See* 640 F. Supp. at 684 n.5.

After the first two actions were settled, Laker's counsel brought yet another suit. That action was filed on behalf of a Los Angeles travel agent that had specialized in the sale of Laker tickets, against three of the airlines that have been defendants in each of the other Laker-related actions. *Brian Clewer, Inc. v. Pan Am. World Airways, Inc.*, No. 86-6003 (C.D. Cal. filed Jan. 7, 1986). The Clewer action, which alleged the same antitrust conspiracy to destroy Laker as is alleged in this case and in the suits previously brought by Laker itself and the transatlantic passengers, was dismissed on May 14, 1986 on the ground that the travel agent lacked antitrust standing under Sec-

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\* *Laker Airways Ltd. v. Pan Am. World Airways, Inc.*, No. 82-3362 (D.D.C. filed Nov. 24, 1982); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, No. 83-0416 (D.D.C. filed Feb. 15, 1983); *Laker Airways Ltd. v. Union de Transports Aeriens*, No. 83-2791 (D.D.C. filed Sept. 22, 1983). These three actions were consolidated on November 11, 1983.

\*\* *In re North Atl. Air Travel Antitrust Litig.*, No. 84-1013 (D.D.C. filed Mar. 30, 1984).

tion 4 of the Clayton Act, 15 U.S.C. § 15. See 640 F. Supp. at 684. The Court of Appeals for the Ninth Circuit affirmed. 811 F.2d 1507. This Court denied Clewer's petition for a writ of certiorari on November 2, 1987. No. 87-365.

Also after the first two actions were settled, Laker's counsel brought the present suit on behalf of 313 former employees of Laker against all of the defendants in *Laker I* plus two additional airlines. The plaintiffs filed two separate actions, *Adams v. Pan Am. World Airways, Inc.*, No. 86-0304 (D.D.C. filed Feb. 3, 1986) (309 plaintiffs) and *Clifton v. Pan Am. World Airways, Inc.*, No. 86-0629 (D.D.C. filed Mar. 7, 1986) (4 plaintiffs). The Laker employees alleged that, as a result of the conspiracy, they lost their jobs. The two actions were consolidated by the District Court.

On June 30, 1986, Judge Greene, who had presided over *Laker I* and *Laker II*, dismissed the consolidated employees' suits on the ground that the employees lacked antitrust standing under Section 4 of the Clayton Act. *Adams v. Pan Am. World Airways, Inc.*, 640 F. Supp. 683 (D.D.C. 1986); petition at 18a. More specifically, Judge Greene performed the analysis mandated by *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), and concluded that every one of the factors noted in that decision required dismissal.

*First*, the employees were neither consumers nor competitors in the market in which they alleged trade was restrained and no unusual circumstances, such as the labor market boycott alleged in *Radovich v. National Football League*, 352 U.S. 445 (1957), existed to confer standing. *Second*, any injury suffered by the employees would have been an indirect result of injury suffered by their employer, Laker.

Moreover, Laker and Laker's passengers not only claimed more direct injuries, but had in fact already brought and concluded separate actions before Judge Greene. *Third*, the employees' purported damages were highly speculative owing to intrinsic problems of proof. *Fourth*, given the problems of proof, and the existence of other actual and potential plaintiffs, the action posed difficulties of judicial management, with problems of complex apportionment and risks of duplicative recovery. Petition at 20a-23a.\*

The Court of Appeals for the District of Columbia Circuit affirmed, on September 1, 1987. *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24 (D.C. Cir. 1987); petition at 1a. The Court of Appeals held that although the employees satisfied the threshold requirement of alleging an antitrust injury, the factors controlling under *Associated General Contractors* "compel the conclusion" that they lack standing. *Id.* at 16a.

The court observed that the injuries the employees allege are indirect, being "one step removed from the harm to Laker," that no special circumstances were present to confer standing, and that both Laker and Laker's passengers "have already asserted claims in their own rights, received substantial settlement payments, and vindicated the public interest in antitrust enforcement." *Id.* at 9a-12a. Moreover, the employees' purported damages were so speculative that not to dismiss their claims would "impair the effective enforcement of the antitrust laws." *Id.* at 14a. Finally, there was a risk of multiple recovery or unduly complex litigation

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\* Judge Greene also determined, under the authority of *Associated General Contractors*, that the conclusory allegation that the defendants intended to harm the employees was insufficient to establish standing. Petition at 23a n.10; see 459 U.S. at 537 ("an allegation of improper motive, although it may support a plaintiff's damages claim under § 4, is not a panacea that will enable any complaint to withstand a motion to dismiss") (footnotes omitted).

owing to the existence of other actual and potential plaintiffs with damage theories inconsistent with those of the employees. *Id.* at 14a-16a.

The employees sought rehearing en banc. The petition was denied, with “[n]o member of the Court request[ing] the taking of a vote thereon.” Appendix at 1a.

A petition for a writ of certiorari was filed on January 21, 1988.

### **Reasons for Denying the Petition**

There is not a single issue in this case that was not addressed and resolved by this Court in *Associated General Contractors*. As in that case, although the employees alleged a causal connection between a purported antitrust injury and the harm they suffered, numerous other factors established that they are not proper plaintiffs under Section 4 of the Clayton Act.

“‘An antitrust violation may be expected to cause ripples of harm to flow through the Nation’s economy, but “despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.” It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.’”

*Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534-35 (1983) (citation omitted), quoting *Blue Shield v. McCready*, 457 U.S. 465, 476-77 (1982). This Court accordingly has identified “factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.” 459 U.S. at 537. The Laker

employees, as the courts below emphatically found, fail on each of these factors.

The Laker employees were neither consumers nor competitors in the market in which trade was allegedly restrained. *See* 459 U.S. at 539. They were not airlines competing in the transatlantic market or passengers of Laker or of any other airline competing in that market. They were Laker's employees. 640 F. Supp. at 685, petition at 21a. Indeed, the employees themselves finally admit this, asking the Court to determine the antitrust standing of persons "who are neither competitors of the defendants nor consumers." *Id.* at 7.\*

The Laker employees' alleged injury is indirect. *See* 459 U.S. at 540. Their complaint acknowledges that the purpose of the alleged conspiracy "was to eliminate Laker." Amended Complaint ¶ 48, petition at 45a. They do not claim that they sustained any injuries until after this purpose was achieved, *i.e.*, until the receiver "dismantled" Laker and dismissed the employees. "[H]owever [their] final dismissal may be labeled, the harm to [the employees] is one step removed from the harm to Laker." 828 F.2d at 28, petition at 9a.

The indirectness of the employees' claim is evident from the prior *Laker* actions, brought by Laker and passengers

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\* The Laker employees argue that they were "participants" in the relevant market, if not consumers or competitors. Petition at 6-7. Not only were petitioners not participants in the market in which the restraints were alleged to have occurred, the only conceivable markets in which virtually all of them were participants were various sub-markets of the United Kingdom labor market. Congress surely did not enact the United States antitrust laws to prevent derivative injuries to participants in a foreign labor market, particularly where the alleged restraint did not even occur in that market. In any case, as the Court of Appeals observed, "[a]stute counsel should not be able, merely by feats of characterization, to confer standing." 828 F.2d at 28, petition at 9a.

in the transatlantic market. And, as this Court has declared,

“The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general.”

459 U.S. at 542. In this case, of course, more immediate plaintiffs—Laker itself and the airline passengers—not only exist, but, in *Laker I* and *Laker II*, “have already asserted claims in their own rights, received substantial settlement payments, and vindicated the public interest in antitrust enforcement.” 828 F.2d at 29-30, petition at 12a. Denying the Laker employees a remedy on the basis of their allegations in this case “is not likely to leave a significant antitrust violation undetected or unremedied.” 459 U.S. at 542.\*

The damages claimed by the Laker employees are highly speculative, “[p]artly because [they are] indirect, and partly because the alleged effects on the [employees] may have been produced by independent factors.” 459 U.S. at 542. The employees alleged injuries ranging from lost wages, seniority, job security and pensions to emotional distress and even physical harm suffered in subsequent employment. As the Court of Appeals held,

“In part plaintiffs’ economic fate was tied specifically to Laker; we cannot assume its indefinite sur-

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\* Indeed, conferring standing upon the Laker employees is likely to hinder enforcement of the antitrust laws. “[D]efendants in [antitrust] lawsuits are unlikely to enter into settlements if each such settlement can immediately be followed by a new treble damage lawsuit based on the same allegations as the first, the only real distinction being that some new group of alleged victims is bringing the action.” 640 F. Supp. at 686, petition at 23a (footnote omitted).

vival in an exceptionally volatile industry characterized by frequent mergers and bankruptcies. Further, the prosperity of each of the 313 plaintiffs would depend on how long he or she would have remained with Laker, with what advancement, what salary increases, etc. Finally the court would need to consider each plaintiff's prospects of obtaining comparable employment in aviation or other industries."

828 F.2d at 30, petition at 13a (citations & footnotes omitted). The alleged damages of the Laker employees are not merely complex. *See id.* at 13. As recognized by both courts below, their very existence is exceedingly speculative. *Id.* at 13a, 21a-22a.\*

The claims of the Laker employees also pose "the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages." 459 U.S. at 544. In the series of lawsuits following Laker's failure, the different plaintiffs and would be plaintiffs have asserted conflicting claims to portions of Laker's projected gross revenues, with these projections based on inconsistent theories of how Laker would have fared had it continued in operation. In *Laker I*, Laker's creditors, stockholders, and attorneys sought damages premised on a projection of high profits for Laker. In *Laker II*, Laker's passengers asserted damages premised on Laker's fares being exceptionally low. Laker's employees seek to collect damages premised on plentiful jobs and generous salaries and benefits. 828 F.2d at 31, petition at 15a. The massive and complex damages litigation that would result from conferring standing on individ-

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\* The judgment below, therefore, is entirely consistent with this Court's decision in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). In that case, although "there was uncertainty as to the extent of the damage, . . . there was none as to the fact of damage." *Id.* at 562.

ual employees such as Laker's would "not only burden[] the courts, but also undermine[] the effectiveness of treble-damages suits." 459 U.S. at 545.

This case is different from *Associated General Contractors* only in that it presents even more compelling factual circumstances in which to recognize that standing is not appropriate for all persons who claim to be injured by an antitrust violation. *See Cargill, Inc. v. Monfort, Inc.*, 107 S. Ct. 484, 489 n.5 (1986) ("a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons"). The courts below applied the factors recognized by this Court as being relevant to the inquiry and found that each of them militated in favor of dismissing these claims. The judgment here on review is not based on narrow grounds, but on the entire breadth of *Associated General Contractors* applied to a routine case.

In response, petitioners imagine a conflict among the circuits that does not exist. While hypothesizing that at least six of the circuit courts of appeals likely would have decided this case the same way, petitioners contend that the Second, Fourth and Ninth Circuits "would have probably" decided it in their favor. Petition at 7-9. The conflict petitioners propose is entirely supposititious.

*First*, as this Court noted in *Associated General Contractors*, "the infinite variety of claims that may arise [under § 4] make it virtually impossible to announce a black-letter rule that will dictate the result in every case." 459 U.S. at 536. Instead, the courts must depend upon various factors "that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.* at 537. The decisions below reflect the prudent and full exercise of that judgment in a particular

situation, giving full weight to precisely those factors that have been recognized and approved by this Court. Even a hypothetical circuit-split cannot be presumed in the case of such a fact-dependent inquiry.

*Second*, although the District Court found that the Laker employees were neither consumers nor competitors in the relevant market, the Court of Appeals did not specifically rely on this fact, emphasizing instead the various other factors recognized in *Associated General Contractors*. This demonstrates not only the breadth of the failures in the employees' case, but also undercuts entirely their supposition that this case somehow would result in a conflict among the circuits as to the antitrust standing of persons who are neither consumers nor competitors in the relevant market. A conclusion that petitioners are neither consumers nor competitors supports the dismissal of their claims, but it was not necessary to the judgment below.

*Third*, the decisions the employees cite in no way conflict with the decision below or with any other decision by a circuit court of appeal. In both *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356 (9th Cir. 1986) ("*Raiders II*"), and *Crimpers Promotions Inc. v. Home Box Office, Inc.*, 724 F.2d 290 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), the courts explicitly stated that the respective plaintiffs were *competitors* in markets in which trade was restrained. 791 F.2d at 1365; 724 F.2d at 296 n.6. These cases thus hardly evidence a conflict among the circuits on the antitrust standing of persons who are *not* consumers or competitors in the relevant market.

Moreover, in *Crimpers* the court expressly found that the plaintiff was the direct victim of a group boycott. 724 F.2d at 297. Similarly, in *Raiders II* the plaintiff stadium

was a victim of a group boycott directly imposed in the stadium market in which the football teams were consumers. In contrast, as the District Court observed, “[t]he Laker employees do not and cannot allege any kind of boycott; when their employer was forced out of business, they had to look for employment elsewhere, and in this endeavor some were successful and some were not.” 640 F. Supp. at 685, petition at 21a. Indeed, there is no allegation of *any* restraint in the alleged market, the “market for airline employment” in which the Laker employees argue they were participants. Amended Complaint ¶ 52, petition at 45a.\*

The employees’ reliance on the Fourth Circuit decision that led to this Court’s opinion in *Blue Shield v. McCready*, 457 U.S. 465 (1982), is similarly misplaced. The Fourth Circuit’s decision predates *Associated General Contractors* and thus cannot reflect any disagreement among the circuits regarding the proper interpretation of that case or the application of its teaching. Moreover, as this Court emphasized in *Associated General Contractors*, McCready was

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\* Petitioners also rely on the Ninth Circuit’s decision in *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), cert. dismissed, 469 U.S. 1200 (1985). *Ostrofe* was a suit brought by a marketing director and sales manager against his employer and its competitors after the marketing director was discharged for refusing to implement a price-fixing conspiracy. Because the plaintiff alleged he was the victim of a boycott in the labor market, he clearly had standing to sue, but the Ninth Circuit went on to conclude he would also have standing to challenge the price-fixing conspiracy in the product market because he “was such an integral part of the scheme to eliminate competition.” 740 F.2d at 746. The court emphasized that there was “no one else with as strong an incentive to ‘vindicate the public interest in antitrust enforcement’ ” and that criminal proceedings had begun only after plaintiff’s disclosure of the conspiracy. *Id.* (citation omitted). Thus, *Ostrofe* was expressly motivated by the special policy considerations involved in the protections afforded whistle-blowers who are fired for refusing to participate in the conspiracy.

both a consumer of services in the restrained market and a direct victim of a group boycott. 459 U.S. at 530 n.19 & 538.\*

In short, the courts below applied the analysis mandated by this Court in *Associated General Contractors* and, based upon the guiding factors discussed in that decision, came to the inevitable conclusion that the Laker employees do not have standing under Section 4. The judgment below presents no disagreement among the circuits, and there is no reason to revisit the underlying basis for that judgment which was so recently and unequivocally declared by this Court.

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\* The Laker employees argue that their position is similar to the plaintiff's in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Petition at 7. As noted in *Associated General Contractors*, however, the plaintiff in *Mandeville* was directly harmed by the sugar refineries which had allegedly conspired to fix the price they would pay for beets. 459 U.S. at 529 n.19.

### **Conclusion**

For the foregoing reasons, respondents request that the Court deny the petition for a writ of certiorari.

February 20, 1988

Respectfully submitted,

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## **APPENDIX**

### **UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**September Term, 1987**

**No. 86-5468**

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**DAVID WEAVER ADAMS, *et al.*,**

**v.**

**PAN AMERICAN WORLD AIRWAYS, INC.,  
a domestic corporation, *et al.*,**

**AND CONSOLIDATED CASES**

**[Filed Oct. 23, 1987]**

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**BEFORE:** Wald, Chief Judge; Robinson, Mikva, Edwards,  
Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley,  
Williams, D. H. Ginsburg and Sentelle,  
Circuit Judges

### **ORDER**

Appellants' suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

**ORDERED**, by the Court *en banc*, that the suggestion is denied.

*Per Curiam*

**FOR THE COURT:**

**GEORGE A. FISHER, Clerk**  
**BY: ROBERT A. BONNER**  
Robert A. Bonner  
Deputy Clerk

Circuit Judge Sentelle did not participate in this order.